

11th EDITION

CALIFORNIA

LEGAL ASPECTS OF REAL ESTATE

California Real Estate Law

William H. Pivar and Robert J. Bruss

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

CALIFORNIA LEGAL ASPECTS OF REAL ESTATE 11TH EDITION
©2022 Kaplan North America, LLC
Published by DF Institute, LLC, d/b/a Dearborn Real Estate Education and
Kaplan Real Estate Education
1515 West Cypress Creek Road
Fort Lauderdale, Florida 33309

All rights reserved. The text of this publication, or any part thereof, may not be reproduced in any manner whatsoever without written permission from the publisher.

10 9 8 7 6 5 4 3 2 1

ISBN: 978-1-0788-2915-1

10 9 8 7 6 5 4 3 2 1

ISBN: 978-1-0788-2916-8 (custom)

CONTENTS

	Introduction	ix
	About the Authors	xv
	Acknowledgments	xvii
UNIT 1	Sources of Law and the Judicial System	1
	Key Terms	1
	Definition of Law	1
	Influences on Our Legal System	2
	Constitutional and Statutory Law	3
	Court Structure	11
	Lawsuit Procedure	14
	Judicial Remedies	15
	Equitable Remedies	16
	Alternative Dispute Resolution (ADR)	18
	Summary	19
	Discussion Topics	19
	Discussion Cases	21
	Unit Quiz	23
UNIT 2	Law of Agency	27
	Key Terms	27
	Agents and Agency Defined	27
	Types of Agents	28
	How Agencies Are Created	29
	Proof of Agency	35
	Authority of Agents	36
	Fiduciary Duties of an Agent	37
	Liability of Agents	43
	Liability of Principals	44
	Breach of Agency	45
	Termination of Agency	46
	Summary	47
	Discussion Cases	48
	Unit Quiz	51

UNIT 3	Duties and Responsibilities of Licensees	55
	Key Terms	55
	Law and Ethics	56
	Salesperson Status	56
	Agent's Duties to the Principal	58
	Agent's Duties to Buyers	63
	Duties to Other Brokers	78
	Fees to Nonlicensees	80
	Duty of Buyers	81
	Summary	82
	Discussion Cases	83
	Unit Quiz	87
UNIT 4	Regulations of Licensees	93
	Key Terms	93
	The California Department of Real Estate	94
	Activities Requiring a License	96
	When Licensing Is Not Required	97
	License Requirements	98
	License Renewals	100
	Grounds for Disciplinary Action	101
	Mortgage Brokers	105
	Real Property Syndicates	110
	Mineral, Oil, and Gas Brokers	110
	Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act)	111
	Escrow Agent	111
	Mobile Home Sales	111
	Advance Fee Rental Agents	113
	Business Opportunity Brokers	114
	Appraisers	117
	Fair Housing	117
	Summary	131
	Discussion Cases	132
	Interactive Fair Housing Case Studies	136
	Unit Quiz	137
UNIT 5	Law of Contracts	143
	Key Terms	143
	Types of Contracts	143
	Essentials of a Valid Contract	145
	Void and Voidable Contracts	154
	Options to Contract	156
	Interpretation of Contracts	157
	Discharge of Contracts	158
	Contractual Remedies	161
	Assignment of Contract	165
	Statute of Frauds	165
	Statute of Limitations	168
	Laches	169
	Seals	169
	Judgments	170
	Summary	170

	Discussion Cases	172
	Unit Quiz	175
UNIT 6	Real Estate Contracts	181
	Key Terms	181
	Listings	181
	Options	195
	Broker's Forms	198
	Real Estate Purchase Agreement	199
	Leases	222
	Broker-Salesperson Agreement	222
	Retention of Records	222
	Disclosures	226
	Summary	227
	Discussion Cases	228
	Unit Quiz	232
UNIT 7	Property, Estates, and Recording	237
	Key Terms	237
	Origin of California Land Ownership	237
	Property	238
	Degree of Ownership	243
	Recording of Real Property Interests	247
	Summary	253
	Discussion Cases	254
	Unit Quiz	255
UNIT 8	Ownership of Real Property	259
	Key Terms	259
	Ownership in Severalty	260
	Tenancy in Common	260
	Joint Tenancy	262
	Community Property	265
	Tenancy in Partnership	271
	Real Estate Investment Trusts	275
	Corporations	275
	Unincorporated Associations	277
	Multiple Housing Developments	277
	Owner Liability	283
	Summary	289
	Discussion Cases	290
	Unit Quiz	295
UNIT 9	Acquisitions and Conveyances	299
	Key Terms	299
	Voluntary Transfers of Real Property	299
	Involuntary Transfers of Real Property	308
	Transfers of Real Property Upon Death	314
	Summary	319
	Discussion Cases	321
	Unit Quiz	323

UNIT 10	Real Property Security Devices	327
	Key Terms	327
	Promissory Notes	328
	Mortgages and Trust Deeds	334
	Loan Types, Conditions, and Regulations	350
	Consumer Protection Acts	354
	Summary	360
	Discussion Cases	362
	Unit Quiz	365
UNIT 11	Involuntary Liens and Homesteads	369
	Key Terms	369
	Involuntary Liens	369
	Declaration of Homestead	381
	Summary	384
	Discussion Cases	385
	Unit Quiz	387
UNIT 12	Adjacent Property Rights	391
	Key Terms	391
	Boundary Disputes	391
	Nuisance	395
	Water Rights	396
	Support	397
	Easements	398
	License	406
	Summary	406
	Discussion Cases	407
	Unit Quiz	411
UNIT 13	Land-Use Controls	417
	Key Terms	417
	Zoning	417
	Covenants, Conditions, and Restrictions	425
	Regulation of Subdivisions	429
	Environmental Law	435
	Builder and Developer Liability	438
	Summary	439
	Discussion Cases	441
	Unit Quiz	445
UNIT 14	Escrow and Title Insurance	449
	Key Terms	449
	Escrows	449
	Title Insurance	458
	Summary	464
	Discussion Cases	465
	Unit Quiz	468

UNIT 15	Landlord-Tenant Law	473
	Key Terms	473
	Types of Tenancies	473
	The Lease	475
	Assignments and Subleases	480
	Termination of Leases	481
	Rights and Responsibilities of Landlords	482
	Rights and Responsibilities of Tenants	491
	The Eviction Process	493
	Mobile Home Tenancies	498
	Condominium Conversions	501
	Rent Control	501
	Summary	503
	Discussion Cases	505
	Unit Quiz	510
	Discussion Case Analyses	515
	Unit Quiz Answer Key	557
	Glossary	563
	Index of Cases	591
	Subject Index of Cases	607
	Index	617

INTRODUCTION

ABOUT THE TEXT

California Real Estate Law is an introduction to the vast body of law that governs real estate transactions in California. It will not, however, qualify you to give legal advice, which would be the unauthorized practice of law. Rather, it will help you recognize situations in which legal counsel should be sought and help you understand rights and obligations under the law. Only by understanding these rights and obligations can you professionally serve and protect the interests of your clients, as well as the public.

Perhaps the most useful of the pedagogical features in this text are the many *Case Studies* and *Discussion Cases* presented throughout. Case Studies are the author's synopses of actual cases, including the facts, the courts' decisions, and some of the reasons for their decisions. These learning aids directly relate to the topics they appear with, illustrating key principles of the discussion.

End-of-unit Discussion Cases also summarize actual court cases and are relevant to the preceding unit. However, instead of presenting their final decisions, they pose a question to the reader, prompting individual consideration or classroom discussion.

Each of the 15 units of this text opens with a list of *key terms*, alerting readers to important vocabulary words that will be discussed in that unit.

These terms appear in boldface the first time they are introduced in the unit discussions, and they are then briefly defined in the *Glossary* that appears at the end of the book.

Every unit also ends with a *Unit Quiz*, consisting of multiple-choice questions similar in form, content, and difficulty level to questions found on the California Real Estate Brokers' Examination.

Legal citations are included for both the Case Studies and the Discussion Questions. You might wish to look up cases using one of the internet search engines. Law libraries that are open to the public generally are located in the buildings housing superior courts. Most of the cases cited can also be found on the internet.

THE ELEVENTH EDITION

This is the eleventh edition of *California Real Estate Law*, first published in 1987. In each new edition, we have updated the text with new relevant cases and updates to the discussions spurred by developments in the real estate field and by changes in our laws. We also carefully incorporated the input of many instructors and students concerning ways in which we could better meet their needs.

WEB LINK



From time to time, we will add *new* Case Studies related to this edition of *California Real Estate Law* at www.dearborn.com. These will be divided by text unit topic for easier reference. Be sure to check the site periodically, not only as you complete your course but throughout your professional career. These ever-changing case studies will help you to stay sharp and to keep up to date on recent court decisions affecting California's real estate law.

On the following pages, we also offer guidance on using various search engines to access the massive database that is the internet. We also list several useful websites you can use to further broaden your legal research capabilities.

LEGAL CITATIONS

A legal citation has three parts: volume, particular set of books, and page. The letter C. stands for *California Reports*, which are cases from the California Supreme Court. The letters C.A. refer to *California Appellate Reports* from the California appellate courts. Most of the citations listed are from these two sets of law books.

Because of the sheer number of volumes, books have gone into new series, so *2d* means *second series*. A citation 19 C.A.3d 468 would mean *Volume 19* of the *3rd Series* of *California Appellate Reports*, and the case cited would be on page 468.

Besides separate state reporters of appellate and supreme court cases, there are regional reporter series covering state supreme court and appellate court cases from a number of states. Examples are the *Atlantic Reporter*, shown by the letter A, and the *Pacific Reporter*, shown by P. California cases are also in the *Pacific Reporter*.

Federal district court cases are reported in *The Federal Supplement* series and are shown as *F. Supp.* Federal appellate court cases are reported in the *Federal Reporter*, shown as F., or *Second Series*, shown as *F.2d*.

U.S. Supreme Court cases are found in *United States Reports*, indicated by U.S., or *Lawyers Edition Second Series*, shown as *L.Ed.2d*, or *Supreme Court Reporter*, shown as *S. Ct.*

Most statutes relating to activities in real estate are contained in one inexpensive volume titled *Real Estate Law*, which is published by the California Department of Real Estate and available through many college bookstores or directly from the California Department of Real Estate. You can also access this book without charge on the website www.dre.ca.gov.

WEB LINK



Laws are not static. Besides annual changes in the statutes that create new law, court decisions can change duties and responsibilities under existing statutes. The changing nature of laws requires that a real estate agent keep current with these changes through professional papers and magazines, seminars, and continuing education. It is hoped that this book will be just one step in your continuing program of professional training.

INTERNET RESOURCES

The internet can be an important tool for the real estate professional. It has applications toward all aspects of real estate, including the law, and its usefulness can be expected to increase significantly in the future.

Search engines are internet sites that enable a computer user to find information by typing a word or combination of words. Google claims to search more than 130 trillion separate pages (2018 estimate). The growth of the database has resulted in searches that cover just a fraction of the available data.

Assume you wanted information about a tenant's right to claim constructive eviction in order to be released from lease obligations. Using a search engine such as Google, if you searched "California real estate law," you would find thousands of references, too many to make a meaningful search. If you used "California real estate law/landlord/tenant," you would reduce the number of sites to several hundred. Defining your interest by using "California real estate law/constructive eviction" would reduce your search to a manageable number of matches.

The following internet sites will help you meet your legal research needs:

www.boe.ca.gov

Board of Equalization site for sales tax registrations

www.car.org

California Association of REALTORS® website, real estate legal news, proposed laws, CAR opinions, a legal strategic defense link, and lots more

http://resources.ca.gov/legal_affairs/

This information site developed by the California Resource Agency, with a database containing California environmental law and links to federal law

www.courts.ca.gov

Information about the California court system

www.courts.ca.gov/opinions.htm

California Supreme Court and appellate court listings

www.dfeh.ca.gov

California Department of Fair Employment and Housing website

www.dir.ca.gov

California Department of Industrial Relations

www.donotcall.gov

National Do Not Call Register

www.dre.ca.gov

California real estate salesperson and broker license status, how to get a real estate license, and lots of other valuable material

www.epa.gov

The Environmental Protection Agency site, with information on programs and laws.

www.fairhousing.com

The site of the National Fair Housing Advocate, with information on housing discrimination issues

www.fanniemae.com

This site of the Federal National Mortgage Association, with information on FNMA-owned properties, FNMA services, and FNMA mortgage-backed securities

www.fcc.gov/encyclopedia/do-not-call-list/

FCC Do Not Call registry.

<http://fedstats.sites.usa.gov>

Access to statistics prepared by various federal agencies

www.fema.gov

Information on FEMA programs, including National Flood Insurance

www.findlaw.com

Lots of links to cases, statutes, lawyers, law schools, subjects, directories, U.S. Supreme Court opinions since 1893, and endless resources. One of the best websites. Also, www.findlaw.com/cacases/, which is devoted to California cases

<http://journal.firsttuesday.us/forms-download-2/>

RPI—(Realty Publications, Inc.) California real estate forms available online

www.freddiemac.com

Federal Home Loan Mortgage Corporation, with information on mortgage-backed securities and services.

www.ftb.ca.gov/forms/search

California state income tax forms back to 1994

www.ftc.gov/

Primary website of FTC Trade Commission, which enforces the Sherman Antitrust Act

www.ginniemae.gov

Site of the Government National Mortgage Association, which includes information on mortgage-backed securities and GNMA services

www.hud.gov

Information on HUD programs

www.hud.gov/fairhousing

HUD office of fair housing and equal opportunity

www.hud.gov/offices/hsg/mfh/hc/mfhc.cfm

HUD multifamily housing clearinghouse

www.inman.com

Excellent source of up-to-the-minute real estate news

<http://apps.irs.gov/app/picklist/list/priorFormPublication.html>

Federal income tax forms back to 1992

www.justanswer.com

Allows you to ask real estate law questions to lawyers for online answers

www.law.cornell.edu/wex

Lots of information on federal and state mortgage law and court decisions

www.law.com

Up-to-date legal news

www.legalzoom.com

Do-it-yourself legal forms

www.leginfo.ca.gov

This State of California website, which includes an index of all of California's statutory law and can be searched by key word

www.leginfo.ca.gov/const.html

The California Constitution website

www.martindale.com

Directory of lawyers, a who's who in American law. Visit www.lawyers.com to locate a nearby real estate attorney.

www.meganslaw.ca.gov

Provides access to names, addresses, and zip codes of registered sex offenders

www.nolo.com

Great self-help law center

www.nsc.org

The National Safety Council site, which offers information on environmental hazards (lead poisoning)

www.orea.ca.gov

Bureau of Real Estate Appraisers for licensing, certification, and regulation of appraisers

www.realtytimes.com

Real estate consumer and industry news presented in a lively format, including late developments on legal aspects from a consumer's view

www.realtor.com

Lots of information for real estate agents, homebuyers, and sellers, legal questions and answers, and much more; one of the most complete real estate websites

www.realtor.org

National Association of REALTORS® website

www.ss.ca.gov

Secretary of State site for information on the Uniform Commercial Code, tax liens, limited partnerships, limited liability company, and corporate records

www.va.gov

The informational site on VA programs

www.westlaw.com

More than 10,000 databases of statutes, cases, and public records; some material is free, other is fee-based

Note: While the internet is an extremely valuable tool for obtaining information, do not confuse information with legal advice. For the applicability of information to specific situations, consider obtaining the services of an attorney.

Members of the California Association of REALTORS® (CAR) can obtain advice from CAR's legal staff by calling 213-739-8282 (Monday through Friday 9:00 am to 6:00 pm and Saturday from 10 am to 2 pm).

CAR members can be provided late-breaking legal information by email through REALE-GAL™, a broadcast email service.

ABOUT THE AUTHORS

WILLIAM H. PIVAR

From 1971 to 1994, William Pivar served as Real Estate Coordinator and Professor of Business Education at College of the Desert, Palm Desert, California, where he is now a professor emeritus. Before choosing an academic career, he practiced as a private, corporate, and government attorney specializing in real property. He served as an arbitrator with the Federal Mediation and Conciliation Service, as well as the American Arbitration Association.

Pivar is author of more than 30 textbooks and numerous articles. He holds a bachelor's degree and a law degree from the University of Wisconsin. He was the recipient of the California Real Estate Education Association's Norman Woest Award for California's Outstanding College Real Estate Teacher in 1994.

His other publications include *Real Estate Ethics*, *Real Estate Exam Guide*, *Classified Secrets*, *Power Real Estate Listing*, *Power Real Estate Selling*, *Power Real Estate Negotiation*, *Power Real Estate Letters*, and *California Real Estate Practice*, all published by Real Estate Education Company®.

ROBERT J. BRUSS

Robert Bruss played a key role in making this book user friendly. He set criteria for case selections based on applicability to the business needs of real estate professionals, as well as subject matter that would interest the reader and enhance retention.

Robert Bruss died in 2007 and his keen intellect and encyclopedic knowledge of California real estate law are sorely missed. However, his legacy will continue in the direction he provided to enhance learning and professionalism in real estate education.

For more than 33 years, Robert Bruss wrote the weekly syndicated "Real Estate Mailbag" question-and-answer newspaper column, the "Real Estate Notebook" feature on real estate trends, "Real Estate Law and You" articles about new court decisions affecting real estate, and "Real Estate Book Review" features. Inman Real Estate News Service distributed these features to several hundred newspapers nationwide each week.

Bruss also published two monthly real estate newsletters, *The Robert Bruss California Real Estate Law Newsletter* and *The Robert Bruss National Real Estate Newsletter*. He was the

author of the books *The Smart Investor's Guide to Real Estate* and *The California Foreclosure Book: How to Earn Big Profits in California Foreclosure and Distress Properties*.

Originally from Minneapolis, Bruss graduated from Northwestern University School of Business in Evanston, Illinois. He received his Juris Doctor degree from the University of California's Hastings College of the Law in San Francisco. He was a California real estate attorney and licensed real estate broker, as well as a lifetime member of the National Association of Real Estate Editors. Bruss taught Real Estate Law at the College of San Mateo, as well as real estate courses for the University of Southern California's College of Continuing Education.

Robert Bruss was the 1997 recipient of the Norman Woest award for outstanding real estate educator of the year.

Real Estate Instructors

If you feel that a particular case or cases should be covered in this text or that a case should be clarified or deleted, please contact contentinquiries@dearborn.com.

ACKNOWLEDGMENTS

The author wishes to acknowledge the many attorneys, educators, and other professionals who have contributed so much thought and effort to this and past editions of *California Real Estate Law*.

Michael Botello, El Camino College

Jill A. Carter, West Los Angeles College

David J. Deka, JD, Dearborn/Anthony Schools

Ed Estes, Jr., Palomar College

Michael C. Glazer, Ivy Tech State College

Bruce Gold, Orange Coast College

Ignacio Gonzalez, Mendocino Community College

Gerald Haight, Modesto Junior College

Paul Hammann, First American Title Company, Santa Ana

Abigail Hatch, Allied Business Schools, Inc.

Ben Hernandez, Jr., Allied Schools

Steven Johnson, Old Republic Title Company, Redwood City

Don Kalal, California Broker's Institute

Robert R. Keeling, Sacramento City College

Alan R. Klokorn, Irvine Valley College

Meldy Langager, Diablo Valley College

James Lawson, The Real Estate School, Woodland

William A. McGrath, JD, Sacramento City College

James F. Miller, Esq., University of Southern California

Jay Mumford, Chabot College

Michael A. Olden, Diablo Valley College

Robert J. Pacheco, Crofton Hills College

Marc B. Robinson, Hartmann & Robinson LLP, Stockton

Roger Lawson Smith, City College of San Francisco

John Smylie, Palomar Community College

Kartik Subramaniam, ADHI Schools, LLC

Bobra G. Tahan, Dearborn/Anthony Schools

Jesse Votaw, San Jose City College

Jason K. Wolins, Humphreys College

Joe Wood, Evergreen Valley College

Dat Yen, Glendale College, Los Angeles City College

Frank Zotter, Jr., Chief Deputy County Counsel, County of Mendocino

1

UNIT ONE



SOURCES OF LAW AND THE JUDICIAL SYSTEM

KEY TERMS

administrative agency	constitutional law	nominal damages
Administrative Procedure Act	declaratory relief action	quiet title
arbitration	due process	reformation
California Department of Real Estate	exemplary damages	regulatory law
civil law	foreclosure	rescission
common law	injunction	specific performance
compensatory damages	liquidated damages	stare decisis
	jurisdiction	statutory law
	mediation	venue

DEFINITION OF LAW

Law is the body of principles governing our conduct that can be enforced through our judicial system. Laws serve various purposes, such as protecting the health, safety, morals, and general welfare of the citizens; protecting the state; protecting property; and achieving equity or justice. Every civilization has realized the necessity for laws because without the guidance of laws, there would be chaos.

The law is not static. It reflects the views of our society, and as our views change, so do our laws. Because law is in a constant state of evolution, it is not always possible to predict the outcome of a dispute. A slight difference in facts can affect the outcome, as can current trends in opinion and even the philosophy of the court where a case is being heard. Courts will often differ regarding interpretations of the law and rights under the law.

INFLUENCES ON OUR LEGAL SYSTEM

English Influence

Most of the basic precepts of our real estate law as well as our legal vocabulary have evolved from English common law. Establishment of a centralized court system at the time of the Norman Conquest (AD 1066) made precedent, or previous decisions, the basis for judging disputes. This reliance on previous decisions is known as **stare decisis**. Thereafter, a body of judge-made law developed. While judges already had been able to differentiate among situations, reliance on previous decisions gave the legal system stability because laws were now more likely to be changed by slight degree than by radical departure from the past. The precepts developed by the courts became known as the **common law**.

The rigid system imposed on the courts by previous decisions often, however, resulted in injustice. In addition, the courts of common law had to wait until a wrong had been committed to make a decision. People would petition the king for special relief, which at times would be granted. This led to the establishment of a second court system, known as courts of equity (i.e., chancery court) that could offer remedies based on what was just and equitable rather than solely on the decisions of the past.

Because of the large number of court decisions, attorneys seldom have a problem finding precedent for conflicting views. State courts rely most heavily on the most recent decisions of higher courts within their own state system. They also consider court decisions from other states, especially sister states (states with similar laws), as well as cases decided through the federal court system. Previous decisions of particular courts, and even particular justices, can influence decisions.

Case decisions might differ among California or federal courts. Conflicts of law can exist until they are clarified by a higher court. For example, a U.S. Supreme Court decision would clarify conflicts between two U.S. courts of appeals decisions. Federal district courts place the greatest emphasis on appellate decisions of their own appellate circuit (the Court of Appeals that would rule on any appeal from that court). Similarly, California superior courts place the greatest emphasis on appellate decisions of their own appellate court.

Often, the decisions of an individual state's courts exhibit a particular trend that characterizes that court system over the years. California courts have been leaders in favoring consumer rights. Throughout this course, the case studies indicate our courts' contribution to expanding consumer protection.

Roman Influence

In the United States, we follow the Roman system of civil law. **Civil law** refers to laws enacted by legislative bodies and codified as statutes. English common law served as a basis for much of our statutory law. Our courts interpret the laws. We have merged the functions of the English common-law courts and the courts of equity into a single system in which judges may follow previous decisions but are not bound to them and have both legal and equitable remedies at their disposal. Case law really serves to define and, at times, modify our statutes. It aids in defining the law under specific fact situations.

Spanish Influence

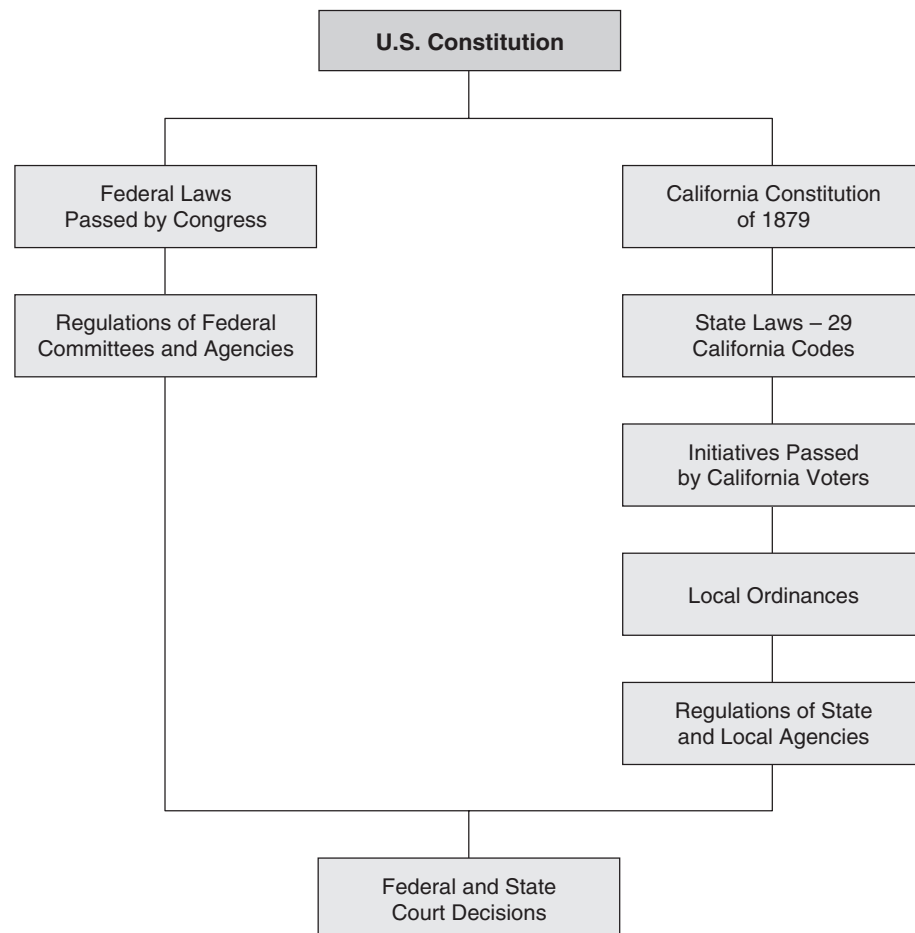
The Treaty of Guadalupe Hidalgo (1848) ended the Mexican-American War, resulting in California becoming part of the United States. Under this treaty, the United States agreed to recognize the property rights of Mexican citizens. This agreement represented more than just recognizing title to property, however. It also made California a community property state. Mexico had adopted from Spain the concept of community property, in which property acquired during marriage is owned equally by the spouses. (See Unit 8 for details on community property rights.)

CONSTITUTIONAL AND STATUTORY LAW

All levels of government (federal, state, and local) enact legislation affecting real property. Law set forth in federal or state constitutions, or **constitutional law**, is distinguished from law based on enacted statutes, or **statutory law**.

Figure 1.1 illustrates the sources of California real estate law.

FIGURE 1.1: Sources of California Real Estate Law



Federal U.S. Constitution The original 13 states granted power to our federal government through the U.S. Constitution. The states reserved to themselves all powers not granted to the federal government. The Constitution is the supreme law of the land, and all legislation enacted at any level must conform to it.

Parts of the Constitution of particular importance to real estate law include the following amendments.

First Amendment (Rights of Free Speech) This amendment protects the right to place For Sale signs on property, as well as to advertise real estate.

CASE STUDY The case of *Greater Baltimore Board of REALTORS® v. Baltimore County* (1990) 752 F. Supp. 193 involved a county statute barring real estate agents from door-to-door or telephone solicitations for listings. The county claimed the law was necessary to stop blockbusting. The court held that the First Amendment of the U.S. Constitution protects commercial speech from unwarranted governmental regulation. Although the purpose of the law was allegedly to prevent blockbusting, the prohibition was too broad to serve its intended purpose and was therefore an unconstitutional prohibition of commercial free speech.

CASE STUDY The case of *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 involved high school students who were seeking support for opposition to a United Nations resolution against Zionism. The plaintiffs set up a card table in the corner of a courtyard at a shopping center in Campbell, California. The activity violated policies of the shopping center and the plaintiffs were required to leave.

The California Supreme Court held that the speech and petition provisions of the California State Constitution protect speech and petitioning reasonably exercised, even in privately owned shopping centers. The court noted that shopping centers have supplanted the town square as a meeting place where free speech can be exercised. The California court held that where rights of individual property owners conflict with the interests of society, individual interests must be subordinated, although reasonable rules could be imposed by the shopping center. *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899.

On appeal to the U.S. Supreme Court, the court held that Pruneyard's regulations violated the students' free speech. California's Constitution protected "speech and petitioning, reasonably exercised in shopping centers even when the shopping centers are privately owned."

CASE STUDY In the case of *Maldonado v. Kemptor* (2006) 422 Fed Supp 2nd 1169, the plaintiff, Maldonado, had a double-sided billboard on top of a commercial building he owned. The California Outdoor Advertising Act (COAA) regulates billboards and prohibits all billboard advertising along a landscaped freeway unless the billboards advertise goods and services available on the property.

Maldonado was cited in 1993 and 1996 for violating COAA by having advertisements displayed for a shopping center, a Holiday Inn, and Skyway Cellular. After a trial, Maldonado was enjoined from any advertising on his billboard without Caltrans permission. Maldonado then posted “Available for onsite use 650-366-2979” on his billboard. The trial court found Maldonado in contempt. The court even instituted contempt proceedings for a Habitat for Humanity billboard that Maldonado displayed.

Maldonado challenged the constitutionality of COAA because the act stills noncommercial speech, including political advertising rendering COAA in violation of the First Amendment.

The court agreed with Maldonado: “As COAA applies to noncommercial speech, as matter of law, the act impermissibly favors commercial over noncommercial billboards where it permits on-premises commercial billboards.” COAA therefore violated the First Amendment and that part of the act is unconstitutional and invalid.

Note: This was a case of poor draftsmanship. The law could have prohibited commercial advertising except for goods and services available on the property. By banning all advertising other than the onsite commercial exception, they clearly were in violation of the First Amendment.

CASE STUDY In the case of *Bank of Stockton v. Church of Soldiers of the Cross of Christ* (1996) 44 C.A.4th 1623, the bank obtained an injunction against the Church of Soldiers of the Cross of Christ from soliciting donations from bank customers at the bank entrance on bank property.

The Court of Appeal ruled that church members could not solicit on the property because it was a modest retail business and not a public place required to allow free speech. The court held that the bank did not have to show interference with its operation to prohibit free speech on the property. The court held that the First Amendment would apply to public forums, such as large supermarkets and shopping centers.

CASE STUDY The case of *Van v. Target Corp.* (2007) 155 C.A. 4th 1375 was an action for injunctive relief to prevent stores from barring voter-signature gathering at entrances to stores in shopping centers; the trial court held in favor of the stores. While the First Amendment protects gatherings in common areas of shopping centers, it does not protect gatherings in store entrances that are not public walkways. The Court of Appeal affirmed that store entrances were designed for customers to come and go and not for gathering political signatures.

Note: This case limits the *Pruneyard* case as to areas that are considered a public forum.

Fourth Amendment (Security From Unwarranted Search and Seizure)

This amendment protects private property from unreasonable searches and seizures. Search warrants will be issued only on the basis of probable cause.

Fifth Amendment (Rights of Accused) This amendment states that an accused may not “be deprived of life, liberty, or property, without **due process** of law.” Before property can be taken away from its owner, that person must be given his day in court.

The Fifth Amendment also prohibits the taking of private property for public use without just compensation and in effect gives the government the power to condemn private property for public use upon payment of just compensation (called the *power of eminent domain*). The Fourteenth Amendment makes the Fifth Amendment applicable to the states.

CASE STUDY In the U.S. Supreme Court decision of *Kelo v. City of New London* (Connecticut) (2005) 125 S. Ct. 2655, Susette Kelo and 15 other property owners in the Fort Trumbull neighborhood sued the city, claiming the area was not blighted or run-down and taking their properties by eminent domain would violate the “public use” requirement of the Fifth Amendment because the land would then be turned over to a private developer for construction of a hotel, offices, and shopping area. The city council approved the redevelopment plan that would create over 1,000 jobs, increase tax and other revenues, and revitalize the economically distressed city of 24,000. The New London Superior Court granted Kelo and her neighbors a permanent restraining order injunction prohibiting taking of the properties. On appeal, the Connecticut Supreme Court reversed, ruling the city’s takings were valid because they were for a “public use” and in the “public interest” and because title would be turned over to a developer to be selected and the resulting economic development benefits would be a valid public use.

Kelo and her neighbors appealed to the U.S. Supreme Court on the constitutional issue that the eminent domain condemnation was not for “public use” but would primarily benefit the developer and other private owners. In a close 5-to-4 vote,

the U.S. Supreme Court affirmed, upholding the proposed takings of private property, ruling the eminent domain condemnation qualifies as a “public use” under the “takings clause” of the Fifth Amendment because the economic development of the area is for a “public purpose.” The court emphasized promoting economic development is a traditional and long-accepted function of government and there was no evidence the property would be turned over to particular private entities. In her dissent, Justice Sandra Day O’Connor wrote, “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

Note: California’s eminent domain condemnation statute requires a finding of “blight” before a property can be taken for redevelopment.

In 2008, California voters passed Proposition 99, which prohibits state and local governments from acquiring an owner-occupied residence for the purpose of conveying to another person, with limited exceptions.

Tenth Amendment (Powers Reserved for States) This amendment allows the states all powers not delegated to the federal government or prohibited to the states. The states are empowered to enact legislation under this amendment. (The U.S. Constitution determines when the states do not have authority.)

Thirteenth Amendment (Abolishment of Slavery) This amendment has been held to be the basis for the Civil Rights Act of 1968.

Fourteenth Amendment (Equal Protection) This amendment makes the Fifth Amendment applicable to the states. It also provided the basis for our antidiscrimination laws.

Treaties Federal treaties with other governments and with Native American tribes have affected both the ownership of real property and the rights to use property. For example, treaties that gave Indian tribes special sovereignty over reservation lands have exempted the lands from local land-use control. As previously noted, the Treaty of Guadalupe Hidalgo recognized the property rights of Mexican citizens in the United States. This agreement had a particularly strong impact in California and is the basis of our community property laws.

Federal Administrative Agencies An **administrative agency** makes rules and regulations to implement our federal laws. While these rules and regulations are not law, they have the force and effect of law. Rules and regulations of administrative agencies are called *regulatory law*. The Department of Housing and Urban Development (HUD) is responsible for enforcing civil rights laws, the Interstate Land Sales Act, and numerous other federal laws. The Federal Trade Commission (FTC) enforces the Truth in Lending Act. The Federal Housing Administration (FHA) is involved with real estate loans and subsidized housing. The Environmental Protection Agency (EPA) makes rules and regulations protecting our environment.

Administrative agencies have the power to prohibit action and to impose fines for violations. Each agency conducts its investigation, prosecution, and decision making in administrative hearings. Unlike the courts, the agency is not bound by legal principles of evidence and can even make decisions before a hearing.

The right to an attorney supplied by the government or to a jury trial does not apply to proceedings before an administrative agency. Decisions of administrative agencies can be appealed to the courts, provided all administrative appeals have been exhausted. Courts will overturn administrative agency decisions only if they are found to be arbitrary or capricious.

Federal Statutes

A number of federal statutes directly affect real property transactions. Federal statutes are diverse, ranging from antidiscrimination measures to consumer and debtor protection. Examples of federal legislation include

- Federal Housing Act, 12 U.S. Code § 1701 et seq.;
- Real Estate Settlement Procedures Act, 12 U.S. Code § 2601 et seq.;
- Truth in Lending Act, 15 U.S. Code § 1601 et seq.;
- Equal Credit Opportunity Act, 15 U.S. Code § 1691 et seq.;
- Fair Credit Reporting Act, 15 U.S. Code § 1681 et seq.;
- Federal Bankruptcy Act, 11 U.S. Code;
- Civil Rights Act of 1968, 18 U.S. Code § 241 et seq.;
- Civil Rights Act of 1866, C.31, 14 Stat. 27;
- Interstate Land Sales Full Disclosure Act, 15 U.S. Code § 1701 et seq.;
- Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) 18 U.S. Code § 1014;
- Foreign Investment in Real Property Tax Act (FIRPTA), I.R.C. 13455 et seq.; and
- Can Spam Act, 151 U.S. Code 7701 et seq.

California Constitution While the California State Constitution is the supreme law of California, it is subordinate to the U.S. Constitution. In the event of any conflict, the federal Constitution takes precedence. The California Constitution can be found on the internet at www.leginfo.ca.gov/const.html.

California statutes The Civil Code contains the fundamental principles of California real estate law, including ownership rights. Additional statutes related to real estate are scattered throughout California's various legal codes, including the Business and Professions Code, Code of Civil Procedure, Corporations Code, Financial Code, Government Code, Labor Code, Penal Code, and Public Resources Code.

Real estate licensing is covered in Sections 1000 through 10581 of the Business and Professions Code. The regulation of real estate licensees is covered in Sections 11000 through 11030 of the Business and Professions Code. The primary purpose of these statutes is to protect the public by regulating those engaged in the real estate business.

California has incorporated English common law in the Civil Code: “The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state.” (Civil Code Section 22.2) In 1939, the California Supreme Court held that where the codes and other statutes are silent, the common law will govern (*In re Patterson’s Estate*, 34 C.A.2d 305).

Uniform codes Because of a need for conformity in the statutes of various states, the National Conference of Commissioners on Uniform State Laws drafted recommended statutes for adoption by the states. The Uniform Commercial Code is one of those statutes. Areas covered by the Uniform Commercial Code of particular interest to real estate licensees include the definition of personal property, security interests in personal property, what constitutes a fixture, negotiable instruments, and laws governing commercial property, the Bulk Sales Act, and the statute of frauds for personal property. There is, however, no uniform code for real property laws. They vary significantly among the states.

WEB LINK



The California Secretary of State website, <https://www.sos.ca.gov/>, provides information on the Uniform Commercial Code.

State administrative agencies The Bureau of Real Estate Appraisers in the Department of Consumer Affairs regulates the licensing and certification of California appraisers. The Division of Corporations regulates California real estate syndicates, franchise sales, and independent escrow agents. The Department of Health is concerned with safety and health standards, including water quality and waste disposal. Other state agencies also have regulations that affect the real estate business and transactions in real property. When adopting regulations, administrative agencies must follow the procedures set forth in the California **Administrative Procedure Act**, which include public hearings. To be upheld by the court, administrative regulations must be reasonably necessary to carry out statutes and must not conflict with or exceed the scope of statutes. Individuals have the right to petition the Department of Real Estate to adopt or repeal a regulation. Courts will generally overrule an administrative regulation only if it was enacted without authority, proper procedures were not followed, or the regulation is arbitrary, capricious, or otherwise unreasonable.

California Department of Real Estate The California Department of Real Estate (DRE), which is part of the California Department of Consumer Affairs, is the primary state agency to administer California real estate law. The primary purpose of California real estate law is the protection of the public in real estate and mortgage transactions. To carry out this purpose, the real estate commissioner has adopted regulations that are enforceable as the exercise of the police power of the state to promote health, safety, morals, and general welfare of citizens. The DRE was created by legislative act in 1917 and provided the first law in the United States for the licensing and regulation of real estate agents. These laws became a model for legislation in many other states.

Discipline procedures The real estate commissioner, appointed by the governor, is the chief executive officer of the department. The commissioner determines administrative policy and enforces the provisions of the real estate law in a manner that provides maximum protection for the purchasers of real property and those people dealing with real estate licensees.

The real estate commissioner can issue regulations to aid in the administration and enforcement of the law. These regulations, formally known as the *Regulations of the Real Estate Commissioner*, are set forth in Title 10 of the California Code of Regulations, starting with Section 2705, and have the force and effect of the law.

The Administrative Procedure Act authorizes the commissioner to hold formal hearings to determine issues involving a licensee, license applicant, or subdivider. After a hearing, the commissioner may suspend, revoke, or deny a license or halt sales in a subdivision. A corporation may be disciplined for the action of a corporate broker who was acting on behalf of the corporation.

Actions of the real estate commissioner can be appealed to the courts. The California Supreme Court has held that power to regulate cannot be the arbitrary power to grant or refuse a license. In *Riley v. Chambers* (1919) 181 C. 589, the supreme court held: “While the right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, such an occupation may be subjected to regulation in the public interest even though such regulation involves in some degree a limitation upon the exercise of the right regulated.”

CASE STUDY The case of *Donaldson v. California Department of Real Estate* (2006) 134 C.A. 4th 948 involved a real estate salesman, Donaldson, who was found guilty of unlawful intercourse with a minor (his wife's 16-year old sister). The real estate commissioner filed a disciplinary accusation that he had committed crimes involving moral turpitude. She alleged the crimes were substantially related under Section 2910, Title 10 California Code of Regulations to the qualifications, functions, or duties of a real estate licensee. The commissioner failed to adopt the administrative law judge proposal decision for a restricted license and revoked Donaldson's license. She wrote that the convictions “were for crimes involving moral turpitude that are substantially related to the qualifications, functions, or duties of a real estate licensee.” The superior court denied Donaldson's petition for administrative mandamus (a request that the superior court review and reverse the final decision of an administrative agency).

The Court of Appeal reversed, ruling the license revocation was not authorized because the conviction was not substantially related to his professional conduct. “A determination that a licensee’s conviction justifies discipline cannot rest on the moral responsibility of the underlying conduct, but requires a reasoned determination that the conduct was in fact substantially related to the licensee’s fitness to engage in the profession.”

Note: A 2008 amendment to the Business and Professions Code eliminated the need to show moral turpitude.

The real estate commissioner does not have the authority to settle commission disputes. These matters are determined through a court of law; through the state labor commissioner, Department of Industrial Relations (for employer-employee disputes); or by arbitration if agreed to by the parties.

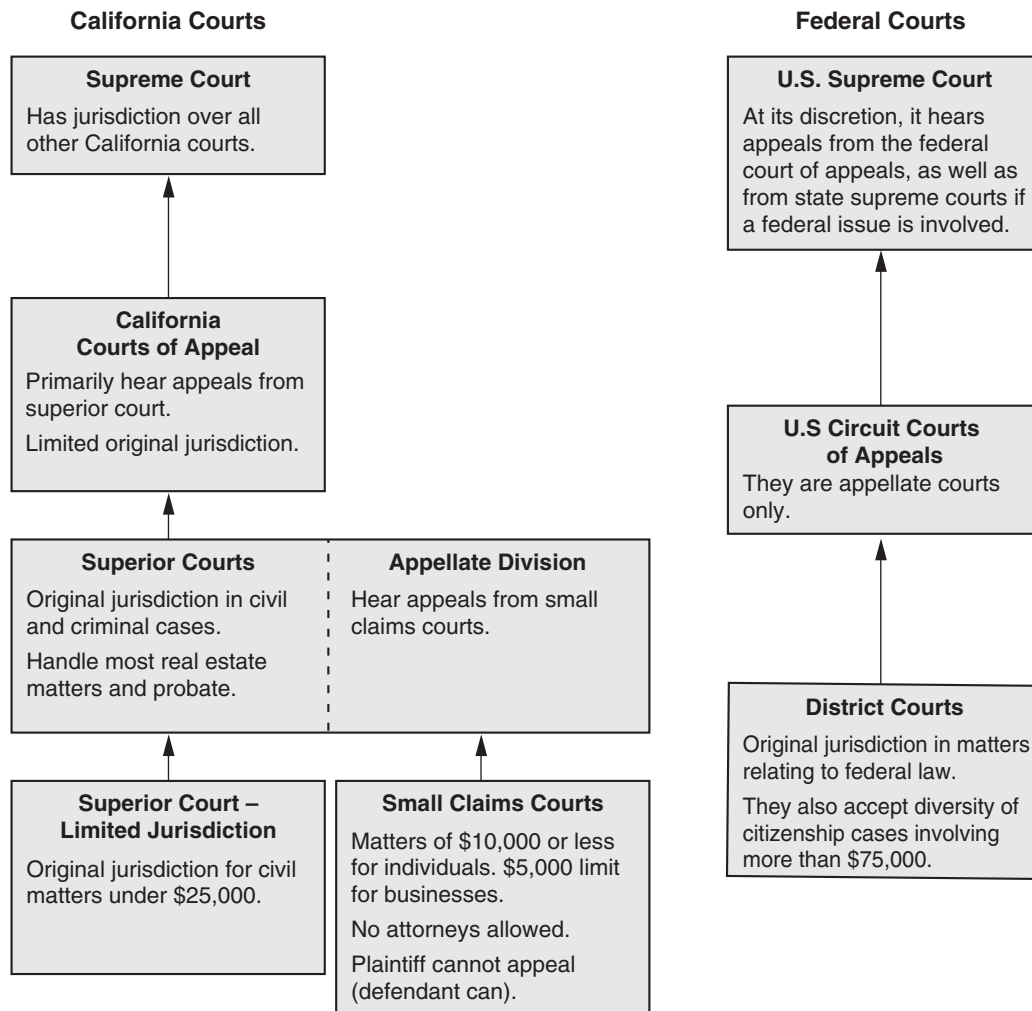
City and county ordinances Under their police power, cities and counties can enact legislation concerning the use of real property to protect health, safety, morals, and general welfare. Such measures include local building codes, health ordinances, police and fire ordinances, and zoning.

City and county administrative agencies Local agencies also make decisions that affect real property. By law, every city and county is charged with the development of a general plan. Local planning agencies not only develop planning but also hear and decide on requests for rezoning. Community redevelopment agencies carry out redevelopment at a local level.

COURT STRUCTURE

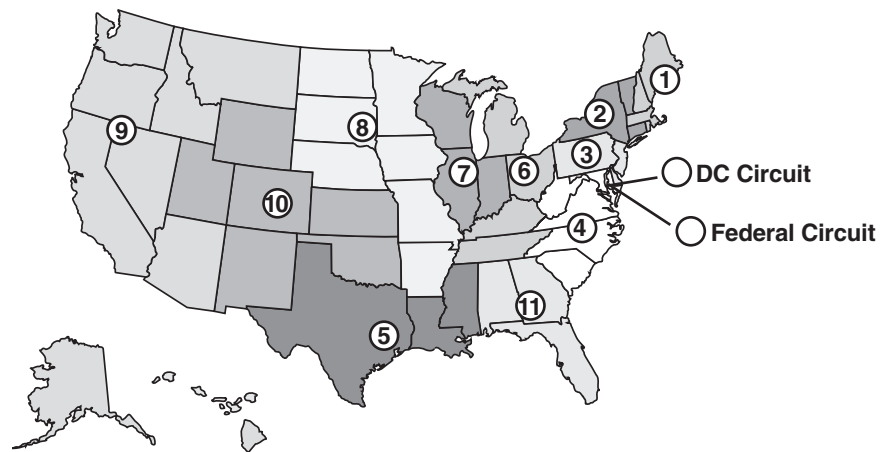
Federal Courts

Because much of our real estate law is based on appellate judicial decisions, it is important to have a basic knowledge of our federal and state court systems. (See Figure 1.2.) The appellate process provides judicial guidance in the form of interpretation and clarification to ensure uniformity in the application of our laws.

FIGURE 1.2: State and Federal Court Systems

District courts District courts are courts of original jurisdiction. Of the 98 federal district courts, 4 of them are in California (Northern, Southern, Eastern, and Central Districts). Besides hearing matters relating to federal law, they accept cases in which plaintiff and defendant are residents of different states (diversity of citizenship) if the case involves a claim of more than \$75,000.

U.S. Circuit Courts of Appeals These courts are limited to hearing appeals from federal district courts. The United States has 13 appeal courts; California is in the Ninth Circuit. (See Figure 1.3.)

FIGURE 1.3: The Thirteen Federal Judicial Circuit Courts

U.S. Supreme Court The U.S. Supreme Court is the highest court in the land. The nine justices are appointed by the president with approval of the U.S. Senate and serve for life. The U.S. Supreme Court can hear appeals from the highest state court if a federal statute, treaty, or constitutional issue is involved. It also hears appeals from the federal courts of appeals.

The Supreme Court is able to hear only a small percentage of the appeals brought to it. Therefore, it tries to choose cases involving important issues. If the Supreme Court refuses to hear an appeal, the lower court decision stands.

The Supreme Court has the power of judicial review of the legislative branch. This power is, however, not set forth in the U.S. Constitution.

CASE STUDY In *Marbury v. Madison* (1803) 1 Cranch 137, the Supreme Court indicated that the legislative branch must take notice of the Constitution. The court declared that an act of Congress that is repugnant to the Constitution of the United States cannot become a law, and it is the province of the judiciary to declare when a law is in conflict with the Constitution.

Special courts A number of special federal courts, including the tax court, court of military appeals, customs court, and court of claims, have very limited jurisdiction.

California Courts

Small claims courts The small claims court is a branch of the superior court. A small claims court commissioner, temporary judge, or judge may preside. Cases are limited to matters involving \$10,000 or less for individuals and \$5,000 or less for businesses. They originally were intended to be consumer courts; today, they are often used by creditors against consumers. Small claims courts follow a relatively informal procedure, with the

parties pleading and defending their own cases; attorney representation is not allowed. A plaintiff (party bringing the action) who loses a case may not appeal, but a defendant (party being sued) who loses may appeal the decision to the superior court, Appellate Division.

Superior courts As of July 1998, judges in each county were allowed to vote if they wanted their county to combine its municipal and superior courts. By 2001, every California county had opted for court unification.

What were formerly municipal courts became limited jurisdiction superior courts that handle civil matters under \$25,000 as well as minor criminal matters (misdemeanors). General jurisdiction superior courts have original jurisdiction in civil cases in excess of \$25,000—felonies, probate, marriage dissolution, mortgage foreclosures, quiet title actions (actions to clear real estate titles), and most real estate disputes. Civil cases involving less than \$25,000 are known as limited civil cases, including unlawful detainer evictions. Every California county has a superior court.

Superior Court, Appellate Division Each superior court has an appellate division. It can adjudicate small claims court appeals brought by defendants (plaintiffs who lose in small claims court have no right of appeal). The appellate division also hears appeals of unlawful detainer evictions and limited civil cases involving less than \$25,000.

California Courts of Appeal These courts have very limited original jurisdiction and hear primarily appeals from the superior courts. There are six courts of appeal in California: Fresno, Los Angeles, San Diego, San Francisco, San Jose, and Sacramento. Each Court of Appeal consists of several panels, each composed of a presiding justice plus two associate justices.

California Supreme Court While in some states supreme court justices are elected, in California they are appointed by the governor and approved by the state senate. The court consists of a chief justice and six associate justices, the California Supreme Court has discretionary appellate jurisdiction over all other California courts. If the California Supreme Court declines to accept a case, then the decision of the lesser court stands. The supreme court can decertify decisions of a Court of Appeal, which means that while a decision stands, it cannot be cited as a precedent for future decisions.

WEB LINK



Additional information about California's court system can be researched at www.courts.ca.gov.

LAWSUIT PROCEDURE

This book uses the case study method as a primary teaching tool. Because most real estate cases are civil matters adjudicated between the parties, rather than criminal matters (where the defendant is charged by the state with a criminal offense), understanding lawsuit procedure will enhance your understanding of the cases to be studied.

A civil lawsuit begins when a plaintiff files a complaint in court. The complaint describes the claim and requests relief. A copy of the complaint, as well as a summons to respond, is then served on the defendant.

Venue is the proper court location for a lawsuit to be tried. In most real estate cases, the proper venue is the county where the real estate is located. However, the plaintiff and/or defendant may petition the court for a change of venue to a more convenient location, such as the county where the real estate contract was signed. The **jurisdiction** of a court is the authority of the court to adjudicate the type of case and make a decision affecting the parties involved.

The defendant then has the option of

- answering the complaint, denying or admitting the allegations;
- filing a complaint (a countersuit) against the plaintiff or against a third party, making the third party part of the action; or
- requesting dismissal based on, among other reasons, lack of jurisdiction; *res judicata* (a prior judgment on the issue between the parties); the facts, if true, not stating a cause of action (demurrer); the statute of limitations (the plaintiff waited too long to begin action); or the party bringing the action has no standing to sue.

During the pretrial period, a discovery process might take place (there is no discovery in small claims cases). During discovery, parties will subpoena witnesses to provide sworn testimony and may also use written interrogatories (questions presented in writing). Parties are also allowed access to records.

Most cases are settled before trial. If the lawsuit goes to trial, the trial begins with opening statements by the plaintiff and defendant. The plaintiff then brings forth witnesses. The plaintiff's examination of witnesses is called a *direct examination*. After the plaintiff's examination, the defendant has the right to examine the witness (called a *cross-examination*). The plaintiff may then question the witness—redirect examination—and the defendant then has an opportunity to re-cross-examine. Next, the defendant has the right to produce witnesses, and the examination process is repeated. Finally, the parties make their closing statements.

If there is a jury, the court will direct questions of fact to the jury. For example: "Did the plaintiff give the defendant a \$2,000 cash deposit?" "What is the amount of monetary damages sustained by the plaintiff?" The judge, not the jury, determines questions of law. Unless appealed, the decision of the court trial is binding on the parties.

JUDICIAL REMEDIES

The English common-law remedies, or legal remedies, were primarily monetary damages. Remedies developed by the chancery courts were known as *equitable remedies*. The equity courts did not generally award monetary damages; their remedies were based on conscience, or what was right. As previously stated, U.S. courts are not limited to legal remedies and can award equitable remedies to right a wrong.

Monetary Remedies (Damages)

Compensatory damages Compensatory damages are money damages to cover the loss for the injury sustained. The court also can assess a party with court costs when provided for by contract or by statute. Attorney fees also may be recoverable.

For example, if a seller forged a termite inspection report that indicated no infestation or damage and, after the sale, the purchaser discovered serious infestation and damage, a court might award the buyer actual costs to correct the problem (compensatory damages) plus exemplary damages.

Exemplary damages Exemplary (or punitive) damages go beyond actual compensation for an injury. They are awarded to punish the wrongdoer for an action that was aggravated by its willful nature, malice, fraud, or wanton and wicked conduct.

For example, if a seller breached a contract to sell a house for \$150,000 so as to sell the house to another buyer for \$200,000, the court might award exemplary damages, in addition to the compensatory damages, for this wrongful and willful breach of contract.

Liquidated damages Parties can agree what the damage will be in the event a party breaches a contract. Courts will enforce these damages as long as they are reasonable estimates of the damages that will result. If they are excessive, they would be considered a penalty and would not be enforced. As an example, a construction contract might have damages for each day of delay in the completion of performance.

Nominal damages Nominal damages are monetary damages in a token sum such as \$1. They are awarded to show a defendant was in the wrong but no substantial damage to person, property, or reputation occurred. An example would be a trespass where a person crossed the land of another without permission or right but caused no damage.

EQUITABLE REMEDIES

Remedies of Conscience

These are the remedies available when judicial remedies are inadequate and equity or conscience demands them.

Specific performance The court can force a person to perform as agreed. **Specific performance** is an equitable remedy usually awarded where money damages are inadequate. Because every parcel of real property is considered unique, specific performance is a proper remedy for breach of a real property sales agreement. While the remedy of specific performance is readily available to purchasers, courts rarely force buyers to buy because money damages are ascertainable. A seller who consequently sells to another buyer for less money usually will receive damages amounting to the difference in the sales prices. (For an exception, see *BD Inns v. Pooley*, cited in Unit 5, where the buyer was forced to complete the sale.)

Specific performance is not available for personal services. That is, the court will not require one person to work for another, because that would violate the Thirteenth Amendment to the U.S. Constitution.

Specific performance will not be granted if the court does not deem the consideration adequate.

Rescission **Rescission** is the mutual release of the parties to a contract. The contract is set aside, and the consideration that was given is returned. This equitable remedy would be used when promises were made because of a mutual mistake, when the contract became impossible to perform, or when the performance of the contract, while legal when the contract was made, became illegal because of a change in the law.

Reformation Through **reformation**, a court rewrites a contract to read as it was intended to be read by the parties rather than as stated. For example, a court would likely reform a lease that described the wrong premises when it was clear from the evidence which premises were intended to be leased.

Injunction Using an **injunction** as an equitable remedy, courts will order a party to cease and desist from an activity, such as a trespass or a nuisance.

Foreclosure **Foreclosure** is an *action in rem*, an action against property, rather than an *action in personam*, which is an action directed against a specific person, such as an action for damages. A foreclosure action seeks to terminate a person's interest in property. Foreclosure actions would be brought by lienholders such as a lender or a holder of a mechanic's lien. Foreclosure is discussed in detail in Unit 10.

Quiet title **Quiet title** is a legal action to determine the ownership or rights in real property. It can be used to wipe out claims against a property to provide an owner with a marketable title, as well as to clear any cloud on a title (such as a misspelled name on a deed).

Declaratory relief action Under common law, a party had to wait until rights had been violated to obtain a legal interpretation of the rights involved. Now, however, a unique equitable remedy is available. Called a **declaratory relief action**, it can be brought to have the court determine rights *before* an invasion of rights has occurred. The purpose is to avoid a violation of law or contract. Courts will not consider hypothetical questions, there must be a real interest in the matter, as well as uncertainty. As an example, a party could ask for a declaratory judgment as to the legality and enforceability of a restrictive covenant that prohibits the party from engaging in a particular business on a property. A declaratory relief action may be used in conjunction with the demand for other relief, such as an injunction.

Criminal vs. Civil Wrongs

Criminal wrongs involve crimes against the state for which the state provides penalties that include fines and/or imprisonment. Civil law involves wrongs committed against individuals for which damages are appropriate. A single act could involve both criminal and civil wrongs. As an example, an act of fraud, such as selling property that the seller does not own, could be criminal and subject the wrongdoer to criminal penalties and also entitle the victim to civil damages.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

In addition to judicial remedies, nonjudicial remedies of arbitration and mediation are available to disputing parties.

Arbitration

Arbitration is a process for final resolution of disputes. Many contracts call for mandatory arbitration, and the courts generally will enforce these agreements. The contracts usually provide for the choosing of the arbitrator and may state that the rules of the American Arbitration Association apply. Also, parties can agree to voluntary private arbitration, in which the arbitrator serves much as a judge in hearing a case but is not bound by the legal rules of evidence or normal court formalities.

The principal benefits of arbitration are that it is faster and less expensive than court action. Matters that could take years before they are heard in court might be decided in days at a small fraction of the cost that would have been incurred in a trial. Because of these benefits, arbitration has been gaining interest as a logical way to resolve disputes. However, parties agreeing to arbitrate disputes give up their legal rights to a jury trial, and the right to appeal the arbitrator's decision, even if it is contrary to established law. After the arbitrator makes a written decision, it can be presented to the local superior court for confirmation as a judgment of that court. At the court confirmation hearing, the judge cannot change the arbitrator's decision.

Mediation

Mediation is a process in which a neutral third party (mediator) works with the parties in a dispute to help them reach a satisfactory solution. The mediator suggests solutions and alternatives and might confer with the parties separately as well as together. Unlike an arbitrator, the mediator has no decision powers. The mediation process is not binding on the parties.

SUMMARY

We are governed by a system of laws enacted by our representatives that are enforceable through our legal system. Our laws range from the U.S. Constitution, which is the supreme law of the land, to local ordinances. The basic precepts of much of our real estate law, as well as a great deal of our legal vocabulary, come from English common law. The common law, however, was judge-made law rather than the statutory law that governs our conduct. The common law was built up over generations by legal precedent.

In addition to law courts, England also developed separate courts of equity. Courts in the United States combine the equity functions of the English equity courts with those of the common-law courts.

We have parallel federal and state court systems that provide for appeals from trial court decisions. The appellate systems provide greater uniformity in our courts.

To effectuate justice, our court system has a wide variety of remedies available to it. These include the remedies available to the English common-law courts as well as the courts of equity. Injured parties can request a remedy that best meets their specific needs.

Alternative dispute resolution includes arbitration and mediation.

DISCUSSION TOPICS

The maxims of jurisprudence (fundamental principles of law) were developed in English common law. California has enacted these maxims into its Civil Code. Rather than being inflexible rules, they are aids to the just application of statutory law. The maxims do not nullify specific statutes.

Most of the maxims are included below, along with the Civil Code citation. Consider the meaning and purpose of each of the following maxims as it relates to real property law:

Civ. Code § 3510 When the reason of a rule ceases, so should the rule itself.

Civ. Code § 3511 Where the reason is the same, the rule should be the same.

Civ. Code § 3512 One must not change her purpose to the injury of another.

Civ. Code § 3513 Anyone may waive the advantage of a law intended solely for his benefit, but a law established for a public reason cannot be contradicted.

Civ. Code § 3514 One must use her own rights so as not to infringe on the rights of others.

Civ. Code § 3515 One who consents to an act is not wronged by it.

Civ. Code § 3516 Acquiescence in error takes away the right of objecting to it.

Civ. Code § 3517 No one can take advantage of his own wrong.

Civ. Code § 3518	One who has fraudulently dispossessed himself of a thing may be treated as if he still had possession.
Civ. Code § 3519	One who can and does not forbid what is done on her behalf is deemed to have bidden it.
Civ. Code § 3520	No one should suffer by the acts of another.
Civ. Code § 3521	One who takes the benefit must bear the burden.
Civ. Code § 3522	One who grants a thing is presumed to grant also whatever is essential to its use.
Civ. Code § 3523	For every wrong there is a remedy.
Civ. Code § 3524	Between those who are equally in the right or equally in the wrong, the law does not interpose.
Civ. Code § 3525	Between rights otherwise equal, the earliest is preferred.
Civ. Code § 3526	No person is responsible for what no person can control.
Civ. Code § 3527	The law helps the vigilant before those who sleep on their rights.
Civ. Code § 3528	The law respects form less than substance.
Civ. Code § 3529	That which ought to have been done is to be regarded as done, in favor of the one to whom, and against the one from whom, performance is due.
Civ. Code § 3530	What does not appear to exist is to be regarded as if it did not exist.
Civ. Code § 3531	The law never requires impossibilities.
Civ. Code § 3532	The law neither does nor requires idle acts.
Civ. Code § 3533	The law disregards trifles.
Civ. Code § 3534	Particular expressions qualify those that are general.
Civ. Code § 3535	Contemporaneous exposition is in general the best.
Civ. Code § 3536	The greater contains the less.
Civ. Code § 3537	Superfluity does not vitiate.
Civ. Code § 3538	That is certain which can be made certain.
Civ. Code § 3539	Time does not confirm a void act.
Civ. Code § 3540	The incident follows the principal and not the principal the incident.

Civ. Code § 3541	An interpretation that gives effect is preferred to one that makes void.
Civ. Code § 3542	Interpretation must be reasonable.
Civ. Code § 3543	Where one of two innocent people must suffer by the act of a third, the person by whose negligence it happened must be the sufferer.
Civ. Code § 3545	Private transactions are presumed fair and regular.
Civ. Code § 3546	Things happen according to the ordinary course of nature and the ordinary habits of life.
Civ. Code § 3547	A thing continues to exist as long as is usual with things of that nature.
Civ. Code § 3548	The law has been obeyed.

WEB LINK

Note: All of the California codes can be accessed on the internet through www.leginfo.ca.gov.

DISCUSSION CASES

1. A homebuyer who was not satisfied with the workmanship in her new home posted signs saying, "I bought a \$200,000 fixer-upper," "My house leaks and no one gives a damn," and "We moved to Paradise Hills but we live in hell." At various times, up to 20 other homeowners posted similar signs. The developer sued, alleging that the statements were made with intent to injure the developer's sales activity. The developer did not allege that the statements made were false. **Was the homeowner acting within her rights?**

Paradise Hills Associates v. Procel (1991) 235 C.A.3d 1528

2. A man was prohibited from distributing religious tracts in the parking lot of a shopping center. **Were his constitutional rights violated?**

Savage v. Trammell Crow Co., Inc. (1990) 223 C.A.3d 1562

3. Antiabortion activists protested in the parking lot of a medical center. They handed out material and prayed aloud. An agent of the landlord sought injunctive relief to prohibit the activities of the protestors. **Should it be granted?**

Allred v. Harris (1993) 14 C.A.4th 1386

4. Golden Gateway Center includes a retail center plus 1,254 residential rental units. Building management prohibits door-to-door solicitations and leafleting within the buildings. The center sought to enjoin the tenant association from distributing newsletters. The association cross-complained for injunctive and declaratory relief. The San Francisco Superior Court ruled in favor of the tenant association. The building owner appealed. **Should the superior court ruling be upheld?**

Golden Gateway Center v. Golden Gateway Tenants Association (1999) 73 C.A.4th 908

5. A city ordinance prohibited homeowners from displaying signs on their property except resident identification, For Sale, and warning signs. The city refused to permit a homeowner to place a sign on her front lawn opposing the Persian Gulf War. **Is the restriction on signs justified?**

City of Ladue v. Gilleo (1994) 114 S. Ct. 2038

6. **When there is a binding arbitration agreement and the arbitrator has clearly made an erroneous decision, will the courts set it aside?**

Moore v. First Bank of San Luis Obispo (1998) 68 C.A.4th 768

7. A city passed an ordinance requiring landlords to evict all occupants of a rental unit when the chief of police suspects that a tenant is engaged in or permits illegal drug activity, gang-related crimes or a drug-related nuisance in or near the property. **Will the courts enforce this ordinance?**

Cook v. City of Buena Park (2005) 126 C.A.4th 1

8. A police officer posed as a prospective buyer in order to obtain access to a home. Based on the officer's observations, a search warrant was obtained and the owner was arrested and sentenced on a methamphetamine charge. **Was the officer's use of a ruse to gain entry a violation of the owner's Fourth Amendment protection against unwarranted search and seizure?**

People v. Lucatero (2008) 166 C.A. 4th 1110

9. A union picketed a store in a shopping mall. The mall sought to stop the picketing because it was detrimental to business in other stores. **Was the picketing proper?**

Fashion Valley Mall LLC v. National Labor Relations Board (2007) 42 C.A. 4th 850

10. A homeowners association sued a developer. The developer wanted the matter resolved by arbitration because the HOA regulations required binding arbitration of disputes. **Must the dispute be handled by arbitration?**

Villa Vicenza Homeowners Association v. Nobel Court Development LLC (2010) 191 C.A. 4th 963

UNIT QUIZ

1. MOST California real estate law originally came from
 - a. Spanish law.
 - b. Mexican law.
 - c. English common law.
 - d. the commissioner's regulations.
2. Reliance on previous decisions is *BEST* described as
 - a. common law.
 - b. stare decisis.
 - c. equity.
 - d. civil law.
3. Our system of statutes in California could *BEST* be described as
 - a. civil law.
 - b. stare decisis.
 - c. equity.
 - d. constitutional law.
4. The Equal Credit Opportunity Act is *BEST* described as
 - a. stare decisis.
 - b. common law.
 - c. civil law.
 - d. constitutional law.
5. The power of eminent domain is based on which amendment to the U.S. Constitution?
 - a. First
 - b. Thirteenth
 - c. Fifth
 - d. Fourteenth
6. Which constitutional amendment allows homeowners to place a For Sale sign on their home?
 - a. First
 - b. Fifth
 - c. Fourteenth
 - d. Twenty-Sixth

7. Laws governing ownership rights are set forth in
 - a. state statutes.
 - b. local ordinances.
 - c. federal statutes.
 - d. the English common law.
8. The regulation of real estate licensees is covered in the
 - a. Administrative Code.
 - b. Corporation Code.
 - c. Civil Code.
 - d. Business and Professions Code.
9. There is no uniform code for
 - a. personal property.
 - b. commercial paper.
 - c. real property.
 - d. all of these.
10. The commissioner's regulations are
 - a. considered to have the force and effect of law.
 - b. known as the real estate law.
 - c. included in the Business and Professions Code.
 - d. none of these.
11. In adopting regulations, an administrative agency must provide for
 - a. alternative remedies.
 - b. arbitration of disputes.
 - c. a public hearing.
 - d. all of these.
12. The real estate commissioner conducts hearings in accordance with the
 - a. Administrative Procedure Act.
 - b. Business and Professions Code.
 - c. Labor Code.
 - d. Public Resources Code.
13. Decisions of the Department of Real Estate
 - a. are binding and final.
 - b. may be appealed to the courts.
 - c. must be made unanimously by the commission.
 - d. must be concurred with by a majority of the commission.

14. Damages awarded by a court in excess of actual damages suffered by a plaintiff are known as
 - a. liquidated damages.
 - b. nominal damages.
 - c. exemplary damages.
 - d. compensatory damages.
15. The California court that has original jurisdiction for a claim of \$100,000 would be the
 - a. California Supreme Court.
 - b. superior court.
 - c. small claims court.
 - d. Court of Appeal.
16. Most real estate disputes are adjudicated in
 - a. federal courts.
 - b. superior courts.
 - c. Court of Appeal.
 - d. the supreme court.
17. MOST lawsuits involving real estate matters can be described as
 - a. criminal proceedings.
 - b. administrative agency actions.
 - c. common-law actions.
 - d. civil actions.
18. Which statement about lawsuits is *NOT* correct?
 - a. The defendant commences the action with a complaint.
 - b. A direct examination of a witness is followed by a cross-examination.
 - c. Most lawsuits are settled before trial.
 - d. If there is a jury, the jury determines questions of fact.
19. Money awarded to an injured person for damages received is called
 - a. exemplary damages.
 - b. compensatory damages.
 - c. nominal damages.
 - d. specific performance.

20. Equitable remedies include all of the following *EXCEPT*
 - a. monetary damages.
 - b. reformation.
 - c. rescission.
 - d. specific performance.
21. The remedy in which a person is ordered to cease and desist from an activity is known as
 - a. reformation.
 - b. specific performance.
 - c. injunction.
 - d. none of these.
22. A legal action to determine ownership rights in real property would be
 - a. an injunction.
 - b. reformation.
 - c. a declaratory relief action.
 - d. a quiet title action.
23. Which is *NOT* an advantage of voluntary arbitration?
 - a. Savings in money
 - b. Right to appeal
 - c. Savings in time
 - d. None of these
24. The process whereby a third person works to resolve a problem but may *NOT* impose a decision on the parties is known as
 - a. arbitration.
 - b. mediation.
 - c. declaratory relief.
 - d. quiet title.
25. A court ordered all parties released of their obligations. The remedy granted was
 - a. reformation.
 - b. injunction.
 - c. declaratory relief.
 - d. rescission.

2

UNIT TWO



LAW OF AGENCY

KEY TERMS

agency	estoppel	power of attorney
agency coupled with an interest	express agency	principal
agent	express authority	ratification
attorney-in-fact	facilitator	respondeat superior
customary authority	fiduciary duty	secret agent
designated agency	general agent	special agent
dual agency	implied agency	tort
equal dignities rule	implied authority	vicarious liability
	ostensible agency	

AGENTS AND AGENCY DEFINED

Section 2295 of the California Civil Code states, “An **agent** is one who acts for or represents another, called the **principal**, in dealings with third people. Such representation is called an **agency**.” Therefore, an agent is one who acts for or represents another.

Because an agent represents a principal, payment to the agent is generally considered payment to the principal. In the same manner, notifying the agent of a fact is the same as notifying the principal. The legal relationship of an agency requires free consent of both the agent and the principal. Courts will not force an agency relationship on parties against their will, nor will they generally require the continuance of an agency if either party wants to end it. Therefore, the principal or the agent can generally end an agency relationship at any time. A party who does so, however, might be liable for damages if terminating the agency breaks a contractual promise. (As an example, while a principal

could arbitrarily cancel a listing contract and end the agency, the principal would be liable to the agent for damages in accordance with provisions of the listing contract.)

Civil Code Section 2296 states, “Any person having the capacity to contract may appoint an agent and any person may be an agent.” A person who wishes to appoint an agent must have both the legal and mental capacity to do so. Legal capacity involves age and/or legal restrictions on contracting, while mental capacity is defined by state of mind. (Legal and mental capacity are covered in detail in Unit 5.) Principals who lack the capacity to perform an act or become contractually bound cannot appoint an agent to perform the act or to contractually bind them. If an act must be in writing, the appointment of someone to perform the act must be in writing.

TYPES OF AGENTS

General Agent

A **general agent** has the authority to perform all necessary acts for the principal within a specified area. For example, a court-appointed conservator of an individual who is unable to manage his affairs is a general agent for managing the conservatee’s finances, arranging the conservatee’s care, and making other important decisions, such as signing real estate contracts.

Special Agent

While a general agent has broad powers to act for the principal, a **special agent** is limited to those acts specifically set forth in the agency agreement. For example, a real estate licensee is normally a special agent of an owner with authority to locate a buyer for a property or a property for a buyer. (The real estate agent normally has no power to sell the owner’s property, buy property for the buyer, or contractually bind the owner.)

Power of Attorney

A **power of attorney** is a written agreement whereby a principal appoints an agent, known as an **attorney-in-fact**, to act in her place. An attorney-in-fact should not be confused with an attorney-at-law. Powers of attorney are normally given for specific purposes, such as to sign a deed when the owner is not available; this is an example of a specific power of attorney. A general power of attorney conveys broad powers to the attorney-in-fact to operate in the place of the principal and to contractually bind the principal within the specified area of the agency. The power-of-attorney document should be in recordable form, including acknowledgment of the principal’s signature by a notary public, so it can be recorded, allowing the attorney-in-fact to sign recordable documents on behalf of the principal. However, when the principal dies, the power of attorney is automatically terminated. The statutory power-of-attorney form is found in Civil Code Section 2450.

Because a principal can sell property owned by the principal without possessing a real estate license and an attorney-in-fact can act in the shoes of the principal and need not possess a real estate license. The exemption from licensing applies only to particular or isolated transactions and may not be used as a substitute for a broker’s license.

HOW AGENCIES ARE CREATED

Express Agency

An **express agency** is an agency created by a specific agreement, either written or oral. Most agencies are express agencies. Listings are the written agency agreements used to authorize an agent to procure buyers or lessees or to locate property for purchase or lease or to locate property for a buyer or lessee.

Agency agreements that must be in writing are covered in Units 5 and 6.

Implied Agency

Most agencies are express agencies created by written or oral agreement. An **implied agency** is not the result of a stated agreement but is created by the actions of the parties that indicate reasonable intent to form an agency. As an example, an owner who tells a broker, “Find me a tenant” is implying that there should be an agency relationship. Agents should be aware that promises to serve the best interests of another could be construed as an agreement to act in an agency capacity even if the promise is gratuitous.

CASE STUDY In the case of *Smith v. Home Loan Funding* (2011) 192 C.A. 4th 1331, a homeowner approached a Home Loan Funding loan officer to obtain a home equity line of credit. The loan officer indicated he would shop around and get her the best loan. The loan officer then convinced the homeowner that it was in her best interests to refinance with a new first loan from Home Funding.

The homeowner discovered that she was qualified for a better interest rate from another lender.

In a suit for damages, the trial judge ruled that the loan officer was acting as a mortgage broker as well as a lender and breached his fiduciary duty. The lender was held liable for the discounted difference between the mortgage payments the borrower would make for 30 years and the payments the borrower was qualified for, a difference of \$72,187.17.

The Court of Appeal affirmed, stating that an oral promise to shop for the best loan created an oral agency agreement and the lender was liable for breach of fiduciary duty.

Ostensible Agency

California Civil Code Section 2298 states, “An agency is either actual or ostensible.” If one person causes others to believe that another person is their agent when that is not true, the courts can declare the principal bound due to the existence of an apparent or **ostensible agency**. Section 2300 of the Civil Code states, “An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.” For example, assume a real estate agent took a prospective tenant to a property owner’s place of business and asked

the owner of the property for the key to show the property. Assume the owner complied in the presence of the prospective tenant. A court may declare that the owner's actions (or inaction) resulted in the prospective tenant's reasonably believing that an agency existed. The owner could therefore be liable to the tenant for actions of the ostensible agent.

Agency of Estoppel

When an ostensible agency is created and a third person reasonably acts to that person's detriment based on the belief of the existence of the agency, the person who allowed the ostensible agency to exist would be estopped (barred) from denying the existence of the agency. For example, assume an out-of-town owner informed a broker that the owner's cousin had the authority to give a listing on the owner's property. The broker, acting on this assertion, listed and then procured a buyer for the owner's property. The owner would be estopped from denying the existence of the agency because his other words led the broker to act to the broker's detriment. The agency created what is called an *agency by estoppel*. The doctrine of **estoppel** is one of equity to achieve justice. (See *Phillippe v. Shapell Indus. Inc.*, Unit 5.)

Agency by Ratification

By accepting the benefits of an agreement made by an unauthorized agent or by an agent who has exceeded his authority, a principal can form an agency by **ratification**.

If a principal had the authority to permit the unauthorized act at the time it was performed, the principal has the authority to ratify or approve the act after it was done. A principal cannot ratify part of an indivisible agreement; the entire agreement must be ratified.

After knowing of the unauthorized act, the principal can ratify the act by words or actions that indicate the intent to be bound by said act. The principal can also ratify through silence or the failure to repudiate an unauthorized act after receiving knowledge of it. For example, an owner who accepts the rents under a lease entered into by an unauthorized agent could be ratifying all of the provisions of the lease.

A principal can void prior ratification if the ratification were made with imperfect knowledge of the material facts of the transaction (Civil Code Section 2314). Assume that in ratifying a tenancy, the owner believed the unauthorized agent had entered into a month-to-month tenancy. Upon discovering the tenancy was actually for 20 years, the owner could rescind the ratification.

CASE STUDY In the case of *Behniwal v. Mix* (2005) 133 C.A.4th 1027, a real estate agent allegedly, without authority, signed the sellers' names to a counteroffer, which was accepted by the Behniwals. Subsequently, the owners signed the transfer disclosure statement, database disclosure form regarding registered sex offenders, a natural hazards disclosure statement, agent's disclosure, seller's affidavit of nonforeign status, as well as water heater and smoke detector compliance statements. Subsequently, Mr. Mix was taken to a hospital and sent a handwritten note to cancel escrow because of health reasons. This action was brought by the Behniwals for specific performance (actions were also commenced by both parties against the agent and her broker).

The trial court ruled that because the owners never signed the counteroffer addendum, no contract was formed.

The Court of Appeal reversed, ruling that the sellers ratified the unauthorized signatures by providing required disclosures.

Dual Agency

A **dual agency** exists when an agent represents two principals who are negotiating with each other and have conflicting interests. Any conduct that reasonably leads a buyer to believe that a seller's agent is representing both buyer and seller might create a dual agency.

Because agents often serve as confidants and advisers to purchasers, purchasers easily could be led to believe that the agent is representing them. To avoid the possibility of a court determination that a dual agency exists, a broker must make certain that buyers fully understand that the broker might not be their representative.

While some purchase agreements state that the broker is the representative of the seller, not the buyers, this probably would not be enough to avoid a determination of dual agency if the agent's conduct has led the buyers to believe they were being represented.

Agency Disclosure

Because of misunderstandings by buyers and sellers as to whom the agent represents and what the agency duties are, California required the agent to provide a written agency disclosure to the parties for the sale, purchase, exchange, or lease of one to four residential units and mobile homes (Civil Code Section 2375). The seller's agent can elect to be either a seller's agent or a dual agent representing both seller and buyer. Because the seller's agent has specific duties to the seller, the seller's agent cannot elect to be solely a buyer's agent. The licensee who locates a buyer, however, can elect to be a seller's agent, a buyer's agent, or a dual agent. (See Figure 2.1). The listing would set forth the agency contemplated, and the purchase form would include agency confirmation.

Commercial real estate agents and brokers now have the same agency disclosure responsibilities as residential agents and brokers.

FIGURE 2.1: Agency Election

Seller's Agent	Agent Who Locates Buyer
Seller's agent	Seller's agent
Dual agent	Buyer's agent
	Dual agent

Figure 2.2 explains the agent's responsibility as seller's agent, buyer's agent, or dual agent representing both seller and buyer. There are three steps in agency disclosure:

1. Disclose—written explanation of the types of agency relationships that are possible
2. Elect—a decision about the type of agency relationship for the transaction
3. Confirm—written signed confirmation of agency (usually part of a purchase agreement)

CASE STUDY In the case of *Huijers v. De Marrais* (1993) 11 C.A.4th 676, a real estate agent failed to provide the owner with a copy of the residential agency disclosure form at the time the listing was taken. The Court of Appeal ruled that the listing agent's failure to provide the disclosure (as required by Civil Code Section 2373, etc.) at the time of listing relieved the sellers of any duty to pay a sales commission.

CASE STUDY The case of *Brown v. FSR Brokerage, Inc.* (1998) 62 C.A.4th 766, involved a situation where an agent from Fred Sands Realty listed Brown's home for \$2,695,000. The seller's agent orally informed Brown that he was Brown's exclusive agent. The agent told Brown that unless the price was reduced to \$2.4 million, he would lose a prospective buyer. (During the negotiation process, the agent had told the seller how much the buyer was willing to offer and also told the buyer how little the seller was willing to accept, but eventually advised the seller not to accept less than a full-price offer.) While no written offer was presented to Brown, the agent said it was time to go to escrow. Brown signed, but failed to read the agency confirmation stating that the agent was a dual agent.

The superior court ruled that the agency had been properly confirmed. The Court of Appeal reversed, holding that a dual agency must be disclosed as soon as practical. The agency was represented as being a seller's agent, and the agent misrepresented whom he was representing until the confirmation. The court also pointed out that the agent breached duties by revealing to each party the position of the other party.

FIGURE 2.2: Agency Disclosure Form


	<p><u>AGENCY LAW DISCLOSURE</u></p> <p>Disclosure Regarding Real Estate Agency Relationships For Negotiating the Sale or Exchange of Real Estate</p>																
<table style="width: 100%;"> <tr> <td style="width: 60%;">Prepared by: Agent _____</td> <td style="width: 40%;">Phone _____</td> </tr> <tr> <td>Broker _____</td> <td>Email _____</td> </tr> </table>		Prepared by: Agent _____	Phone _____	Broker _____	Email _____												
Prepared by: Agent _____	Phone _____																
Broker _____	Email _____																
<p>NOTE: This form is used by agents as an attachment when preparing a listing agreement, purchase agreement or a counteroffer on the sale or exchange of residential property, commercial property, raw land or mobilehomes, to comply with agency disclosure law controlling the conduct of real estate licensees when in agency relationships. [Calif. Civil Code §§2079 et seq.]</p>																	
<p>DATE: _____, 20____, at _____, California.</p>																	
<p>TO THE SELLER AND THE BUYER:</p>																	
<ol style="list-style-type: none"> 1. FACTS: When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction. 2. SELLER'S AGENT: A Seller's Agent under a listing agreement with the Seller acts as the Agent for the Seller only. A Seller's Agent or a subagent of that Agent has the following affirmative obligations: <ol style="list-style-type: none"> 2.1 To the Seller: <ol style="list-style-type: none"> a. A fiduciary duty of utmost care, integrity, honesty and loyalty in dealings with the Seller. 2.2 To the Buyer and the Seller: <ol style="list-style-type: none"> a. Diligent exercise of reasonable skill and care in performance of the Agent's duties. b. A duty of honest and fair dealing and good faith. c. A duty to disclose all facts known to the Agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of the parties. 2.3 An Agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above. 3. BUYER'S AGENT: A Buyer's Agent can, with a Buyer's consent, agree to act as the Agent for the Buyer only. In these situations, the Agent is not the Seller's Agent, even if by agreement the Agent may receive compensation for services rendered, either in full or in part, from the Seller. An Agent acting only for a Buyer has the following affirmative obligations: <ol style="list-style-type: none"> 3.1 To the Buyer: <ol style="list-style-type: none"> a. A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer. 3.2 To the Buyer and the Seller: <ol style="list-style-type: none"> a. Diligent exercise of reasonable skill and care in performance of the Agent's duties. b. A duty of honest and fair dealing and good faith. c. A duty to disclose all facts known to the Agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation, of the parties. An Agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above. 4. AGENT REPRESENTING BOTH THE SELLER AND THE BUYER: A Real Estate Agent, either acting directly or through one or more salespersons and broker associates, can legally be the Agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer. <ol style="list-style-type: none"> 4.1 In a dual agency situation, the Agent has the following affirmative obligations to both the Seller and the Buyer: <ol style="list-style-type: none"> a. A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer. b. Other duties to the Seller and the Buyer as stated above in their respective sections. 4.2 In representing both Seller and Buyer, a dual agent may not, without the express permission of the respective party, disclose to the other party confidential information, including, but not limited to, facts relating to either the Buyer's or Seller's financial position, motivations, bargaining position or other personal information that may impact price, including the Seller's willingness to accept a price less than the listing price or the Buyer's willingness to pay a price greater than the price offered. 5. SELLER AND BUYER RESPONSIBILITIES: Either the purchase agreement or a separate document will contain a confirmation of which agent is representing you and whether that agent is representing you exclusively in the transaction or acting as a dual agent. Please pay attention to that confirmation to make sure it accurately reflects your understanding of your agent's role. 6. The above duties of the Agent in a real estate transaction do not relieve a Seller or a Buyer from the responsibility to protect their own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A Real Estate Agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional. 7. If you are a Buyer, you have the duty to exercise reasonable care to protect yourself, including as to those facts about the property which are known to you or within your diligent attention and observation. 8. Both Sellers and Buyers should strongly consider obtaining tax advice from a competent professional because the federal and state tax consequences of a transaction can be complex and subject to change. 9. Throughout your real property transaction, you may receive more than one disclosure form, depending upon the number of Agents assisting in the transaction. The law requires each Agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the Real Estate Agent in your specific transaction. 10. This disclosure form includes the provisions of §2079.13 to §2079.24, inclusive, of the Calif. Civil Code set forth on the reverse hereof. Read it carefully. 																	
<table style="width: 100%;"> <tr> <td style="width: 80%;">(Buyer's Broker) _____</td> <td style="width: 20%;">Date _____</td> </tr> <tr> <td>(Signature of Salesperson or Broker-Associate, if any) _____</td> <td>Date _____</td> </tr> <tr> <td>(Seller's Broker) _____</td> <td>Date _____</td> </tr> <tr> <td>(Signature of Salesperson or Broker-Associate, if any) _____</td> <td>Date _____</td> </tr> </table>	(Buyer's Broker) _____	Date _____	(Signature of Salesperson or Broker-Associate, if any) _____	Date _____	(Seller's Broker) _____	Date _____	(Signature of Salesperson or Broker-Associate, if any) _____	Date _____	<table style="width: 100%;"> <tr> <td style="width: 80%;">(Buyer's Signature) _____</td> <td style="width: 20%;">Date _____</td> </tr> <tr> <td>(Buyer's Signature) _____</td> <td>Date _____</td> </tr> <tr> <td>(Seller's Signature) _____</td> <td>Date _____</td> </tr> <tr> <td>(Seller's Signature) _____</td> <td>Date _____</td> </tr> </table>	(Buyer's Signature) _____	Date _____	(Buyer's Signature) _____	Date _____	(Seller's Signature) _____	Date _____	(Seller's Signature) _____	Date _____
(Buyer's Broker) _____	Date _____																
(Signature of Salesperson or Broker-Associate, if any) _____	Date _____																
(Seller's Broker) _____	Date _____																
(Signature of Salesperson or Broker-Associate, if any) _____	Date _____																
(Buyer's Signature) _____	Date _____																
(Buyer's Signature) _____	Date _____																
(Seller's Signature) _____	Date _____																
(Seller's Signature) _____	Date _____																

FIGURE 2.2: Agency Disclosure Form (continued)

----- PAGE 2 OF 2 — FORM 305 -----

2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

a. "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under whose license a listing is executed or an offer to purchase is obtained. The agent in the real property transaction bears responsibility for that agent's salespersons or broker associates who perform as agents of the agent. When a salesperson or broker associate owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the salesperson or broker associate functions.

b. "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee of real property.

c. "Commercial real property" means all real property in the state, except (1) single-family residential real property, (2) dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5, (3) a mobilehome, as defined in Section 798.3, (4) vacant land, or (5) a recreational vehicle, as defined in Section 799.29.

d. "Dual agent" means an agent acting, either directly or through a salesperson or broker associate, as agent for both the seller and the buyer in a real property transaction.

e. "Listing agreement" means a written contract between a seller of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer, including rendering other services for which a real estate license is required to the seller pursuant to the terms of the agreement.

f. "Seller's agent" means a person who has obtained a listing of real property to act as an agent for compensation.

g. "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the seller's agent.

h. "Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.

i. "Offer to purchase" means a written contract executed by a buyer acting through a buyer's agent that becomes the contract for the sale of the real property upon acceptance by the seller.

j. "Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property, and includes (1) single-family residential property, (2) multiunit residential property with more than four dwelling units, (3) commercial real property, (4) vacant land, (5) a ground lease coupled with improvements, or (6) a manufactured home as defined in Section 18007 of the Health and Safety Code, or a mobilehome as defined in Section 18008 of the Health and Safety Code, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code.

k. "Real property transaction" means a transaction for the sale of real property in which an agent is retained by a buyer, seller, or both a buyer and seller to act in that transaction, and includes a listing or an offer to purchase.

l. "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.

m. "Seller" means the transferor in a real property transaction and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor of real property.

n. "Buyer's agent" means an agent who represents a buyer in a real property transaction.

§2079.14. A seller's agent and buyer's agent shall provide the seller and buyer in a real property transaction with a copy of the disclosure form specified in Section 2079.16, and shall obtain a signed acknowledgment of receipt from that seller and buyer, except as provided in Section 2079.15, as follows:

a. The seller's agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement.

b. The buyer's agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase. If the offer to purchase is not prepared by the buyer's agent, the buyer's agent shall present the disclosure form to the buyer not later than the next business day after receiving the offer to purchase from the buyer.

§2079.15. In any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt pursuant to Section 2079.14, the agent shall set forth, sign, and date a written declaration of the facts of the refusal.

§2079.17. (a) As soon as practicable, the buyer's agent shall disclose to the buyer and seller whether the agent is acting in the real property transaction as the buyer's agent, or as a dual agent representing both the buyer and the seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the buyer's agent prior to or coincident with execution of that contract by the buyer and the seller, respectively.

b. As soon as practicable, the seller's agent shall disclose to the seller whether the seller's agent is acting in the real property transaction as the seller's agent, or as a dual agent representing both the buyer and seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller and the seller's agent prior to or coincident with the execution of that contract by the seller.

c. The confirmation required by subdivisions (a) and (b) shall be in the following form:

[Do not fill out] is the broker of (check one):
(Name of Seller's Agent, Brokerage firm and license number)
☐ the seller; or
☐ both the buyer and seller. (dual agent)
[Do not fill out] is (check one):
(Name of Seller's Agent and license number)
☐ is the Seller's Agent. (salesperson or broker associate)
☐ is both the Buyer's and Seller's Agent. (dual agent)

[Do not fill out] is the broker of (check one):
(Name of Buyer's Agent, Brokerage firm and license number)
☐ the buyer; or
☐ both the buyer and seller. (dual agent)
[Do not fill out] is (check one):
(Name of Buyer's Agent and license number)
☐ the Buyer's Agent. (salesperson or broker associate)
☐ both the Buyer's and Seller's Agent. (dual agent)

d. The disclosures and confirmation required by this section shall be in addition to the disclosure required by Section 2079.14. An agent's duty to provide disclosure and confirmation of representation in this section may be performed by a real estate salesperson or broker associate affiliated with that broker.

§2079.19. The payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer. A listing agent and a selling agent may agree to share any compensation or commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such agreement shall not necessarily be determinative of a particular relationship.

§2079.20. Nothing in this article prevents an agent from selecting, as a condition of the agent's employment, a specific form of agency relationship not specifically prohibited by this article if the requirements of Section 2079.14 and Section 2079.17 are complied with.

§2079.21. (a) A dual agent may not, without the express permission of the seller, disclose to the buyer any confidential information obtained from the seller.

b. A dual agent may not, without the express permission of the buyer, disclose to the seller any confidential information obtained from the buyer.

c. "Confidential information" means facts relating to the client's financial position, motivations, bargaining position, or other personal information that may impact price, such as the seller is willing to accept a price less than the listing price or the buyer is willing to pay a price greater than the price offered.

d. This section does not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information other than price.

§2079.22. Nothing in this article precludes a seller's agent from also being a buyer's agent. If a seller or buyer in a transaction chooses to not be represented by an agent, that does not, of itself, make that agent a dual agent.

§2079.23. A contract between the principal and agent may be modified or altered to change the agency relationship at any time before the performance of the act which is the object of the agency with the written consent of the parties to the agency relationship.

§2079.24. Nothing in this article shall be construed to either diminish the duty of disclosure owed buyers and sellers by agents and their associate licensees, subagents, and employees or to relieve agents and their associate licensees, subagents, and employees from liability for their conduct in connection with acts governed by this article or for any breach of a fiduciary duty or a duty of disclosure.

Some states allow a broker to take a transaction broker or **facilitator** position. The broker is not considered an agent but rather a third-party middleman with no advocacy or fiduciary duties to either buyer or seller. However, the broker does have duties of confidentiality as to information received from either party, as well as duties of fair and honest dealing and to meet the needs of the parties.

While compensation is an indication of an agency relationship, an agent need not receive consideration for an agency relationship to exist.

In the case of *McPhetridge v. Smith* (1929) 101 C.A.122, the court held that “a gratuitous agent upon entering into the performance of the agency is, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal.” Doing someone a favor could result in liability if a licensee breaches an agency duty. The fact that the buyer does not directly pay the broker does not mean that the broker is not the buyer’s agent.

A broker who acts for more than one party to a transaction without the knowledge and consent of all parties involved would be subject to disciplinary action. An undisclosed dual agency also would be grounds for rescission of the contract, as well as forfeiture of rights to compensation.

Note: While California law allows dual agencies, some states prohibit a real estate agent from representing both buyer and seller. This is based on the belief that there is a conflict of interest in giving one agent duties to both parties to a transaction. Besides buyer and seller separate agency, some states have allowed a **designated agency** whereby one agent in a brokerage office represents the buyer, and another agent in the same office represents the seller. This creates a possible conflict of interest because both agents are under the supervision of a single broker. Designated agencies are not authorized in California.

PROOF OF AGENCY

The burden of proving the existence of an agency relationship is on the person who seeks to benefit by the existence of the agency. People seeking such benefit might include an agent seeking compensation from a principal or a principal who wishes to prove that a person was in fact the principal’s agent to establish the existence of agency duties. A third person might wish to prove that the person she contracted with was actually an agent so as to hold a principal liable. As an example, rather than bring a lawsuit against a defendant with little money and no insurance, an injured party might assert that the person who caused the injury was an agent.

CASE STUDY *L. Byron Culver & Assoc. v. Jaoudi Industrial & Trading Corporation* (1991) 1 C.A.4d 300 involved a broker who had been locating suitable property for Del Rayo for several years. The broker obtained Del Rayo's permission to initiate negotiations to acquire property owned by Jaoudi. A salesperson for the broker then obtained a one-time listing for the property that provided for a 3% sales commission. The salesperson then brought in an offer from Del Rayo for \$1,750,000. Jaoudi inquired if the broker Culver and Del Rayo were associated in any way. The salesperson denied any association. Jaoudi later instructed the escrow not to pay Culver any commission. The Court of Appeal, in affirming a superior court decision denying compensation, stated, "An agent has a fiduciary duty to his principal to disclose all information in the agent's possession relevant to the subject matter of the agency," and in a real estate agency, the penalty for failure to disclose a dual agency at the time of the transaction is forfeiture of the real estate sales commission. The Court of Appeal noted that the fact that the agent acted fairly and honorably to both principals did not affect the forfeiture of commission. Jaoudi believed the agent was acting solely as his agent, but the inevitable conclusion is that Culver represented both the buyer and the seller.

AUTHORITY OF AGENTS

Express Authority

Agents have the stated authority given to them in the agency agreement (either oral or written). This is known as **express authority**.

A person cannot orally authorize an agent to perform an act that is required to be in writing. According to the **equal dignities rule**, if the statute of frauds requires the act to be in writing, the agency agreements, such as listings and sales contracts, must be in writing to be legally enforceable. (The statute of frauds is covered in Unit 5.)

Civil Code Section 1624 states that no contract for the sale of real property can be enforced unless signed by the person against whom enforcement is sought. Therefore, a document signed by a real estate agent "as per phone conversation" would be unenforceable.

Implied Authority

Agents also have **implied authority** to perform the acts reasonably necessary to accomplish the purpose of the agency. For example, a managing agent with the power to enter into commercial leases has the implied authority to engage an attorney to draft a lease.

Customary Authority

Customary authority is authority implied by the agent's position. A person dealing with an agent could assume that the agent has the authority customary for such an agency. A general manager of a real estate office would have the customary authority to order stationery and place advertisements.

Secret limitations on the agent's authority that are not known by people dealing with the agent do not limit the agent's customary authority. Assume a real estate agent was the rental and management agent for a commercial building. The agency agreement required all leases for more than 18 months to be signed by the owner. If a tenant received a lease for two years signed by the agent without any knowledge of the limitations on the agent's authority, the tenant could rely on the customary authority of such an agent. (Of course, the agent could be liable to the owner for exceeding authority.)

A third person should not rely on an agent's claim to have greater than customary authority. If, for example, a leasing agent indicates she has authority to give the prospective tenant an option to purchase the property as part of the lease, the prospective tenant has a duty to ascertain whether the agent actually has this authority.

In the normal real estate brokerage situation, the real estate listing agent has express authority (set forth in a listing) to seek buyers for the property of a principal. The broker usually has no express or implied authority to obligate the principal contractually.

Delegation of Agent's Authority

Unless expressly authorized by the principal, an agent has no authority to delegate agency duties, with the exception of

- purely mechanical acts, such as erecting signs, maintaining buildings, and making repairs;
- acts the agent cannot lawfully perform, such as functions requiring an attorney; and
- acts that commonly are delegated, such as the closing function (delegated to an escrow firm).

Unless a listing authorizes an agent to work with other agents, a broker does not have the authority to cooperate with other agents or to disseminate listing information through a multiple listing service.

FIDUCIARY DUTIES OF AN AGENT

Fiduciary Duty

An agent has a duty of trust and must protect the principal's interests. Under this **fiduciary duty**, the agent must act in a manner that is consistent with the best interests of the principal. The agent may not obtain any advantage over the principal by misrepresentation, duress, or adverse pressure.

For an example of a breach of fiduciary duty case, see *Mitchell v. Gould* (1928) 90 C.A. 647, where the principal wanted a short-term lease, but the broker got the tenant to offer a long-term lease. The broker lost his commission.

The agent must account for all funds received or disbursed on behalf of the principal. Making a secret profit would be a breach of the agent's fiduciary duty. The agent's only benefits must be those agreed to by the principal.

A dual agency in which the agent is employed by written contract with a seller to sell a property and is also undertaking to assist the buyer in purchasing that property presents a peculiar and touchy question of duty. An agent may not act for more than one party in a transaction without the knowledge or consent of all the parties thereto (Business and Professions Code Section 10176(d)). The consent should be in writing. In a dual agency situation, the agent has an affirmative obligation to both the seller and the buyer as follows:

- A fiduciary duty of utmost care, integrity, and loyalty in any dealings with either the buyer or the seller
- A duty to exercise diligent, reasonable skill and care in the performance of the agent's duties
- A duty of honesty, fair dealings, and good faith
- A duty to disclose all facts that the agent knows or should know that affect the value or desirability of the property

CASE STUDY The case of *Warren v. Merrill* (2006) 143 C.A.4th 96 involved a buyer, Warren, who wished to buy a condo but did not have the income or down payment necessary to buy the unit he wanted. Merrill, the real estate broker, who calls herself "the Condo Queen," agreed to lend Warren her commission (\$27,000) so he could have 20% down. To show proper income, Merrill suggested that her daughter, Charmaine, be a co-borrower and filled out the loan application showing her daughter earned \$7,500 per month, although she earned far less as a waitress. Before closing, Merrill obtained Warren's signature on an amendment where title would vest in Charmaine's name alone. Charmaine never signed a promised quitclaim deed to Warren. Warren entered the Betty Ford Center for substance abuse rehabilitation and fell behind on payments. Merrill made the payments to prevent foreclosure. When Warren left the Betty Ford Center, he found himself locked out of the condo, which was now rented to tenants.

Warren sued Merrill for breach of fiduciary duty and fraud and sought quiet title, as well as damages. The superior court quieted title in Warren, imposed a constructive trust on the condo, and awarded Warren \$15,000 noneconomic damages plus \$50,000 punitive damages. Merrill appealed.

The Court of Appeal affirmed, ruling the evidence supported the finding that Merrill breached her fiduciary duty to the buyer by fraudulently procuring title to the property in her daughter's name with no intent to deliver a quitclaim deed to Warren. The court also ruled that the unclean hands doctrine did not apply as the parties were not equally at fault. The court also ruled that the statute of frauds did not apply because Warren sought equitable remedies rather than legal remedies.

Note: The trial court was shocked by Merrill's testimony and her lack of concern about defrauding the lender. She was cautioned by the judge regarding her Fifth Amendment right not to incriminate herself, but she proceeded with her testimony. The trial judge stated, "From the beginning of the transaction, she did not intend to perform her promises of placing his name on title." She apparently intended to keep the condo as her own investment property.

Figure 2.3 summarizes the elements of an agent's fiduciary duty.

FIGURE 2.3: Fiduciary Duty of an Agent

Full disclosure	Accounting
Due care	Integrity
Loyalty	Obedience
Honesty	

Full Disclosure

Notice to an agent is considered to be notice to the principal. Therefore, the agent has a duty to inform the principal of any facts that would be likely to influence the principal in making a decision. Unless expressly instructed by the owner not to present such an offer, or unless the offer is patently frivolous, every offer received, whether oral or written, must be communicated promptly to the principal. For example, offers must be presented even if received after the principal has accepted an offer and is contractually bound. The best rule for agents is to present all offers to the seller and let the seller decide to accept, reject, or counteroffer.

CASE STUDY The case of *Roberts v. Lomanto* (2003) 112 C.A.4th 1553 involved the sale of a shopping center. Owner Roberts hired real estate agent Lomanto as exclusive leasing and sales agent. They agreed on a 2% sales commission for the sale of the property. When the shopping center didn't sell, Lomanto made a purchase offer of the \$11 million asking price. She told Roberts the shopping center was not worth more than that. Relying on that representation, Roberts signed a sales contract with her. Before escrow closed, Lomanto requested permission to assign her purchase contract to Pan Pacific. Lomanto again told Roberts the property was only worth \$11 million.

Upon close of escrow, Roberts paid Lomanto her sales commission of \$110,000. Roberts later read in the newspaper that Pan Pacific had paid \$12.2 million for the shopping center. Roberts sued Lomanto for fraud, breach of fiduciary duty, constructive fraud, negligent representation, and breach of contract. The superior court granted summary judgment for broker Lomanto. Roberts appealed.

The Court of Appeal reversed, ruling Lomanto's purchase contract did not terminate her real estate agency fiduciary duties to Roberts, or her duty of full disclosure of material facts including her \$1.2 million secret profit. The appellate court ruled Roberts was entitled to \$1.2 million in damages, plus exemplary damages and restoration of the sales commission.

Note: Unless the principal knows of and consents to an agent's retention of profit, profit belongs to the principal rather than the agent. It is hard to understand why the superior court gave summary judgment for Lomanto.

Full disclosure extends to warning the principal about any dangers or financial problems to be considered, as well as to accurately conveying information about value. Negligence by an agent alone is not enough to make the agent liable; there must be damages.

CASE STUDY The case of *Strebel v. Brenlar* (2006) 135 C.A. 4th 740 involved a buyer of a Sonoma house through a Frank Howard Allan real estate agent who was acting as a dual agent.

Strebel was selling his San Bruno home contingent upon the purchase of the Sonoma home. He contacted his agent for the Sonoma home before closing his sale and was told the Sonoma purchase was on track. Unknown to Strebel, there were IRS tax liens against the Sonoma home that exceeded its sale price. The dual agent was aware of these liens, which precluded the sale completion. The plaintiff was unable to find another home to purchase and was priced out of the Sonoma County market by rising prices. Strebel sued the broker for unfair business practices, fraud, negligence and breach of fiduciary duty. The trial court found that the agent had intentionally concealed material facts with the intent to defraud Strebel. Strebel was awarded \$300,000 economic damages plus \$50,000 noneconomic emotional distress damages.

The Court of Appeals affirmed the economic damages, but reduced the amount to \$202,273 because an appraisal expert failed to substantiate the balance. The economic damages related to the loss of appreciation of the San Bruno home which would not have been sold had Strebel known that the Sonoma property could not be purchased. The court reversed as to \$50,000 emotional damages.

Note: An agent who breaches fiduciary duty can be liable for lost appreciation in a former home.

Due Care

An agent must exercise reasonable or due care in carrying out the duties of the agency. Real estate agents' duties are based on their having the higher knowledge and skills required of a real estate licensee.

CASE STUDY The case of *Furla v. Jon Douglas Co.* (1998) 65 C.A.4th 1069 involved a listing broker who had stated that a house was approximately 5,500 square feet, but qualified it with "information deemed reliable but not guaranteed." The listing agent had received this information from the owner's daughter, who said it came from the architectural plans. During negotiations with the seller and the buyer's agent, Furla, the buyer said, "OK! Fifty-five hundred square feet. I'll pay \$170 a square foot." The offer was accepted.

When the buyer later decided to sell, an agent told him “a knowledgeable REALTOR® would easily recognize that the residence is substantially less than 5,500 square feet.” Furla hired an appraiser who said it was 4,615 square feet. Another appraiser measured it at 4,437 square feet. Furla then sued the listing agent for negligent misrepresentation. While the superior court granted summary judgment for the listing broker, the Court of Appeal reversed holding that there are genuine issues of material fact regarding whether the listing agent had the reasonable basis to report the house as 5,500 square feet and if the buyer relied on this representation. The Court of Appeal emphasized that the square-foot estimate was not merely inaccurate; it was “grossly inaccurate,” by more than 20%. The court remanded the issues to a jury.

Note: The selling broker was not sued, probably because the purchase contract strongly recommended that the buyer obtain independent inspections. It also stated that the buyer’s agent, Fred Sands Realty, made no representations as to the size of the structure.

Loyalty

The agent cannot, without permission, disclose to third parties any confidential facts about the principal or the agency that would not be in the principal’s best interests. This duty continues even after the agency has terminated.

A dual agent cannot disclose to one principal information received in confidence from the other principal, such as that the seller will accept less or that the buyer will pay more.

Honesty

The agent must not only fully disclose all material facts to the principal but also do so in a fair and honest manner so as not to prejudice the judgment of the principal. The agency duty of fairness and honesty extends to all people with whom the agent is dealing.

Accounting

The agent has a duty to account for all funds received or disbursed and must remit funds due the principal in a prompt manner.

Integrity

An agent’s moral conduct in dealings must be beyond reproach. The agent should strive to eliminate even the appearance of conflict of interest. Others should be able to rely on the agent’s word.

An agent cannot compete with the principal. For example, a buyer’s agent may not submit her own higher offer when submitting an offer from the buyer.

CASE STUDY The case of *Field v. Century 21 Klowden-Forness Realty* (1998) 63 C.A.4th 18 involved buyers who sued their buyer agent for negligent representation. The agent failed to recommend inspection of the septic system for code compliance, did not advise buyers to check for a room addition building permit, and did not advise buyers of obvious physical defects. The agent also failed to check the preliminary title report to determine the scope of the easement revealed by the seller's Transfer Disclosure Statement. The easement gave the Otay Water District the right to flood part of the property. The superior court held that the agent breached her fiduciary duty to the buyers.

The Court of Appeal affirmed and pointed out that the broker's fiduciary duty to clients requires the highest good faith.

The court differentiated between the statutory duty that is a nonfiduciary duty mandated after *Easton v. Strassburger* (1984) 152 C.A.3d 90 and the common-law fiduciary duty of an agent that demands the highest good faith and undivided service and loyalty. The court indicated that this duty may encompass the duty to research, investigate, and counsel.

The court's decision was that the case was not barred by the two-year statute of limitations. The three-year statute of limitations (from date of discovery of the breach) applies to the breach of fiduciary duties.

Obedience

An agent has a duty to obey the lawful instructions of the principal (illegal instructions, such as not to show a home to a member of a minority group, must not be followed). An agent who fails to obey lawful instructions or exceeds the authority granted could be held liable for resulting damages.

Agent's Duty to Third Persons

An agent has a duty of honest and fair dealings with others. The principal and the agent could be held liable for the agent's misrepresentation, fraud, or failure to disclose to a third party detrimental information that the agent knew or should have known.

Many agents arrange loans for buyers. If an agent is to receive a fee for arranging a loan, this fact must be conveyed to the buyer who must understand that they can make loan arrangements without use of the agent's services.

Once an agent takes on the responsibility of obtaining a loan for a buyer, the agent is put in an agency position even though the broker was the sole agent of the seller for the purpose of the sale. The agent then has a duty to obtain the loan that best meets the needs of the buyer, not the loan that provides the greatest financial remuneration for the agent. In fact, the broker could be liable to a borrower if the broker by negligence or design recommended a loan to a borrower that was clearly not in the borrower's best interest.

LIABILITY OF AGENTS

Agents are personally liable for their torts and crimes even when committed at the direction of the principal. A **tort** is a civil wrong or a violation of a duty. Civil wrongs that are torts include libel, slander, trespass, assault, negligent injury to others, et cetera. Some torts, such as assault or trespass, can also be crimes. The principal also could be liable.

Agents who do not disclose to third parties that they are acting in an agency capacity can be held personally liable by the third party, even when the principals have directed the agents to maintain secrecy.

A third party who suffers injury because of a breach of contract can seek recovery from either the agent or the principal, but not both. The **secret agent** would, of course, have the right to be reimbursed by the principal for losses suffered if the agent was acting properly within the scope of the agency.

Section 2336 of the Civil Code provides that “one who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction, may set off against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency.”

People who claim to be agents without having authority would be liable for their acts. Section 2342 of the Civil Code states, “One who assumes to act as an agent thereby warrants to all who deal with him in that capacity that he has the authority which he assumes.”

While an agent normally must obey the instructions of the principal, at times, such as in emergencies, obeying those instructions would not be in the best interests of the principal. For example, it could be in the principal's best interests for a managing agent to exceed limitations on expenditures to protect a property from flood damage when the agent is unable to contact the principal. Civil Code Section 2320 provides for this type of situation: “An agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is no time to communicate with the principal.”

CASE STUDY The case of *Jacobs v. Coldwell Banker Residential Brokerage Co* (2017) 14 CA. 5th 438 involved Coldwell Banker's duty to a prospective buyer. Coldwell Banker was marketing a vacant bank-owned home with an empty swimming pool. The plaintiff walked onto the diving board to see over a fence. The plaintiff was injured when the diving board broke. The defendant asserted that there was negligence in failing to warn of the defect. The trial court ruled the agent had breached no duty as there was no actual or constructive notice of a defect. On appeal, the court noted that the diving board was used for a purpose never intended. The accident was unforeseeable and Coldwell Banker was not liable.

Note: Injury alone does not equal liability. A duty must be breached.

CASE STUDY The case of *Horiike v. Coldwell Banker Residential Brokerage Co* (2016) 11 CA. 5th 1024 revolves around discrepancy in square footage and agency duties. The buyer, Horiike was represented by one Coldwell Banker agent and the seller was represented by another Coldwell Banker associate, Chris Cortazzo. After purchasing a home for \$12.25 million, Horiike brought legal action against Coldwell Banker and Cortazzo because the square footage was misrepresented. Public record showed the property having 11,050 square feet with 9,434 square feet of living area. Cortazzo prepared a flyer stating the house had “approximately 15,000 square feet of living area”. This figure reflected the total cited by the architect which included some outdoor living area.

Horiike lost in the trial court which determined that Cortazzo had no fiduciary duty to Horiike, but on appeal, the court ruled that Coldwell Banker was acting as a dual agent and owned fiduciary responsibility to Horiike through both agents.

In a unanimous decision, the California Supreme Court ruled that when an agent representing the seller is working in the same firm as the agent working for the buyer, they become “associate licensees” and have a duty to disclose all pertinent information as to the transaction.

Note: A broker acting as an “associate licensee” has the same disclosure duties to buyer as any other salesperson.

LIABILITY OF PRINCIPALS

The doctrine of **respondeat superior** is that a master is liable for the actions of servants or employees. The principle also applies to agencies. **Vicarious liability** is created not by an act of the principal but because the agent was acting for the principal. The principal is therefore liable for the acts or omissions of a real estate agent acting within the scope of the real estate agency. This liability extends to subagents and includes liability for negligence and misrepresentation. The principal bears the risk of loss of the buyer’s deposit caused by the negligence or fraud of the agent.

CASE STUDY A basement apartment was advertised as “ideal for two men.” A woman was refused the rental, and the unit was rented to two men. A jury determined that the property manager had discriminated against the woman because of her gender. The jury failed to award damages against the owner, who had directed the manager in writing not to discriminate.

The 4th U.S. Circuit Court of Appeal, however, held the owner liable. It was pointed out that an owner cannot shirk a duty to pay taxes or meet safety standards simply because the owner gave someone else responsibility. The duty to comply with the law rests on the owner. *Walker v. Crigler* (1992) 976 F.2d 900.

The principal can be held liable for the misrepresentation of the agent even when the misrepresentation is made without the principal's knowledge. Unless the agent's actions are directed by the principal, however, the principal will not be held criminally liable for crimes of the agent, though the principal could be civilly liable for damages.

For an example of an agent fraud case, see *Ach v. Finkelstein* (1968) 264 C.A.2d 667.

The principal is not liable to third parties who know or should know from the agent's actions that the agent is exceeding the agent's authority. Where the agent's actions are clearly inconsistent with the best interests of the principal, third parties should realize that the agent is exceeding the authority granted.

If an agent exceeded authority in appointing a subagent, then the subagent would be the agent of the broker and not of the principal. In such a case, the principal would not be liable for actions of the subagent (Civil Code 2350).

If the agent suffers a personal loss from following the instructions of the principal, the principal will be obligated to the agent for that loss.

The principal has a duty to deal in good faith with the agent. The principal is liable to the agent for compensation as agreed to by the agency.

The principal could be liable for acts of an agent after termination of the agency if third parties dealing with the agent do not know of the termination and the former agent continues to act as if a valid agency continues. Of course, the former agent would be liable to the principal for damages suffered by wrongful actions.

BREACH OF AGENCY

Either the principal or the agent might breach the agency. If the principal wrongfully terminates the agency agreement, the agent is entitled to damages. Listing contracts customarily provide for a full commission should the principal wrongfully terminate. The agent generally cannot, however, force the owner to continue the agency because an agency requires the consent of the parties.

Because the agent's interest is the commission, the agent cannot force the owner to accept an offer in conformance with the listing (specific performance). However, if an owner rejects a purchase offer that meets the exact terms of the listing, the agent is entitled to a full sales commission.

Exceeding the authority granted, breaching agency duties, and wrongfully renouncing the agency are examples of agents' breaches. Should the agent breach the agency, the agent is liable in damages to the principal. The agent also could be liable for punitive damages for breach of duty if the courts determine that the act was of such a willful and outrageous nature that the agent should be punished.

TERMINATION OF AGENCY

An agency agreement may be ended in a number of ways:

1. *Expiration of its term.* An agency automatically ends with the expiration of its stated term.
2. *Extinction of the subject matter.* The destruction of the property automatically terminates a listing or a management agency agreement in the absence of any agreement to the contrary. In other words, impossibility terminates the agency. For example, if an agent were employed to find a tenant for a property, the destruction of that property would terminate the agency.
3. *Death.* Because an agency is a personal relationship, death of either the principal or the agent terminates the agency. If either the principal or the agent is a corporation, the death of corporate officers would not terminate the agency because a corporation is considered a separate legal entity.
4. *Renunciation.* Because an agency requires consent of the parties, either the principal or the agent can renounce the agency. As stated earlier, if a party wrongfully breaches the agency, that party could be liable for damages.
5. *Incapacity of agent or principal.* If the agent is no longer capable of acting as an agent, or if the principal becomes mentally incapacitated, the agency terminates. Agents who lose their license would be incapable of performance, so the agency would terminate.
6. *Agreement of the parties.* The principal and the agent can mutually agree to terminate their agency.
7. *Full performance.* Satisfactory completion of the object of the agency terminates the agency.
8. *Bankruptcy.* The trustee in a bankruptcy can terminate an agency or allow it to continue. If the bankruptcy of an agent impairs the agent's ability to perform, the principal can terminate the agency.

Agency Coupled With an Interest

In an **agency coupled with an interest**, the agent has an interest in the subject matter of the agency. That is, the agency is created to benefit the agent or a third party. For example, an agent might advance a principal money to stop a foreclosure under an agreement to obtain a listing. The agent then has an interest in the property.

Section 2356 of the Civil Code states that an agency coupled with an interest cannot be terminated by death or incapacity of the principal or by the unilateral act of the principal.

CASE STUDY In the case of *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.* (1993) 19 C.A.4th 615, the owner of a San Diego hotel had signed a 50-year management contract with Marriott Hotels, Inc., for a management fee plus 30% of the cash flow. At the time of the agreement, Marriott subsidiary corporations made trust deed loans of \$23 million to the hotel. The owner filed a lawsuit against Marriott Hotels, Inc., and various subsidiaries, seeking damages for breach of contract, as well as for cancellation of the management contract. Marriott refused to give up management, claiming an agency coupled with an interest. The San Diego Superior Court denied a preliminary injunction terminating the agency because the agency was coupled with an interest.

The Court of Appeal reversed and ruled as a matter of law that the loans were made by other Marriott corporations, so Marriott Hotels, Inc., had no interest. Therefore, the agency could be terminated. (Each corporation was a separate legal entity.)

SUMMARY

An agency relationship is a legal relationship whereby a principal (which in real estate is an owner or prospective buyer) appoints an agent (the broker) to act on their behalf.

Agents can be given broad powers or limited powers. In real estate, the agent customarily has the limited power to obtain a buyer.

Agencies can be created in several ways. While most agencies are formed by express agreements, an agency can be implied by the actions of the parties or created by estoppel or ratification. In real estate, the agency is created by the listing or management agreement.

To prevent misunderstandings about whether the agent is the buyer's agent, the seller's agent, or a dual agent, California requires that an agent provide written disclosure to buyers and sellers for the sale, purchase, or exchange of residential and commercial property and for leases that exceed one year.

The agent has duties based on the good faith and trust required in an agency relationship. These fiduciary duties include

- full disclosure—the agent must disclose to the principal all facts that would be likely to influence the principal's decisions;
- due care—an agent not only must use reasonable care in carrying out the agency but also must use the special knowledge and skills that the agent possesses;
- accounting—an agent must account for all funds received and/or expended;
- loyalty—an agent's primary duty is to the principal. The agent cannot act in a self-serving manner to the detriment of the principal or in any manner not in the principal's best interests; and
- obedience—an agent has a duty to obey the legal instructions of their principal.

The duties of agents go beyond obligations to the principal. The agent has a duty of honest, good-faith dealings with all parties. An agent who breaches duties can be held personally liable.

The principal is liable for acts of the agent within the scope of the agency. The principal has the duty of good-faith dealing with the agent.

Besides the express authority given to the agent by the principal, the agent has implied power to do those acts that are reasonably necessary to carry out the purpose of the agency.

Agencies can be terminated by expiration of the term, destruction of the subject property, death, renunciation by or agreement of the parties, incapacity of the agent or principal, or bankruptcy.

DISCUSSION CASES

1. A property was listed for sale at \$100,000. An offer for \$90,000 was accepted, but the sale failed because the prospective buyer could not obtain financing. The real estate agent later informed a prospect that the property could be purchased for less than its listed price. **What, if any, are the problems in this scenario?**
2. A broker helped the seller determine the list price for a net listing. The broker subsequently sold the property to his daughter and son-in-law without informing the seller of his relationship with the buyers. **Should the fact that it was a net listing and the seller got what they wanted affect the agency duty? In this case, what were the duties of the broker?**

Sierra Pacific Industries v. Carter (1980) 104 C.A.3d 579

3. A broker represented to the owner that an offer of \$300 per acre was a fair price. The broker knew that a very similar tract of land had been sold for \$400 per acre but failed to inform the seller of this sale. **What has the broker done wrong, and what would be the appropriate remedy?**

Moore v. Turner (1952) 137 WV 299, 71 S.E.2d 342

4. A mortgage broker failed to inform the principal that the mortgage broker was going to receive a fee from the lender. In fact, the mortgage broker affirmatively denied he would receive any lender compensation. The mortgage broker did, however, receive such a fee. **Discuss the wrongs and remedy.**

Spraltin v. Hawn (1967) 156 S.E.2d 402

5. Several brokers were engaged in a property exchange. It became apparent that to provide cash for the commissions, a property that an owner wanted \$100,000 for would have to be sold for a higher price. A buyer was induced to pay \$115,000 for the property. She was told that the price was firm. After the close of escrow, she learned that the owner had wanted only \$100,000 for the property. **What are the buyer's rights?**

Crogan v. Metz (1956) 47 C.2d 398

6. The plaintiff agreed to list property at \$15,900 based on the defendant broker's advice. Both the owner and the broker knew that the property eventually would be condemned for a highway. Before actually listing the property, the broker opened an escrow with his name as the buyer. After listing the property, the broker told the owner he was advertising it, but no effort actually was made to do so. The broker indicated to the owner that he had a purported buyer at less than list price. Eventually, a transaction was closed at a price of \$13,000. The broker did not reveal that the buyer was a friend who was applying for a salesperson's license under the broker. The offer accepted provided for title to be in the name of the purchaser or a party to be named later. The owner signed a deed in blank. The broker inserted the names of his wife and himself. Revenue stamps were affixed to indicate a sales price of \$40,000, which the broker later claimed he had paid. The broker wanted \$100,000 from the state for the property. **What are the problem areas that would concern the parties in a lawsuit?**

Smith v. Zak (1971) 20 C.A.3d 785

7. A purchaser declined to complete the 10% deposit as required and indicated willingness to forfeit the deposit that had been made. The owners were told that the broker would be participating in the purchase. Not disclosed were the facts that the original purchaser had declined to complete the deposit and that the balance was to be paid by the broker. The broker also failed to inform the owner that his participation amounted to a seven-eighths interest. **Was the broker's disclosure adequate?**

Bate v. Marsteler (1959) 175 C.A.2d 573

8. The defendants listed a residential property for sale. They received an offer less than the list price and persuaded the plaintiffs to accept it. They informed the plaintiffs that the purchaser intended to live in the property, although they knew the purchasers were investors who intended to resell it. After the sale, the defendants obtained a listing on the property and resold it at a profit. **Have the defendants breached an agency duty?**

Jorgensen v. Beach 'N' Bay Realty Inc. (1981) 125 C.A.3d 155

9. The plaintiff sellers accepted a promissory note secured by a first trust deed on property other than what was being sold. The sellers' agent represented to the plaintiffs that the security was adequate and the maker was financially responsible. The encumbered property was actually inadequate security for the note, and the maker was in shaky financial condition. The trust deed for \$12,000 was created by the defendant by conveying the property on August 15 (day of sale) to the Fullmers. On August 15, the Fullmers then reconveyed the property to Schmidt. It appears these conveyances had the sole purpose of creating paper to be used for the purchase. **In what ways did the agent breach his duties?**

Banville v. Schmidt (1974) 37 C.A.3d 92

10. A real estate agent used the key in a multiple listing lockbox to show a home. While the listing indicated the house was occupied, the agent discovered it to be unfurnished except for some stereos and television sets in cabinets and closets. The agent contacted the police, who searched the house. In addition to stolen property, they discovered drugs. **Was the agent's action proper?**

People v. Jaquez (1984) 163 C.A.3d 918

11. An appraisal by a professional appraiser showed a property value of \$610,000 for a home. While the appraisal indicated the appraiser had studied the property, he had not done so. The appraisal had been prepared by an employee of the appraiser. The appraisal misstated the number of bedrooms, baths, skylights, and fireplaces, as well as the total square footage. It also failed to point out that construction work was still in progress. Based on the appraisal, the plaintiff made a \$200,000 loan secured by a second trust deed on the property. When the borrower defaulted, the lender sued the appraiser. **Is the appraiser liable?**

Foggy v. Ralph F. Clark & Assoc. Inc. (1987) 192 C.A.3d 1204

12. A licensed real estate salesperson, working as a loan agent, submitted a loan package to his real estate broker. The broker rejected it. Nevertheless, the salesperson submitted the package to a mortgage lender. The borrower had never authorized the loan, and her signature was forged on the application. The true value of the property was only \$480,000, but the \$600,000 loan application showed an \$800,000 purchase price. The loan was funded. The broker was sued for loss suffered by the mortgage lender based on respondeat superior, negligent supervision, and equitable indemnity. The broker argued that when the salesperson committed the fraudulent acts, he was not acting within the scope of his agency. **Do you agree?**

Inter Mountain Mortgage, Inc. v. Salimen (2000) 78 C.A.4th 1434

UNIT QUIZ

1. A legal agency requires that
 - a. the agent have the capacity to contract.
 - b. consideration flow from the principal to the agent.
 - c. all agency duties be stated in writing.
 - d. the parties consent to the agency.
2. An agency relationship could be created by all of the following *EXCEPT*
 - a. court order.
 - b. verbal agreement.
 - c. implication.
 - d. ratification.
3. The relationship that exists between a broker and an owner under a listing is *MOST* likely
 - a. an employer-employee relationship.
 - b. a special agency.
 - c. a universal agency.
 - d. a general agency.
4. An agency created by a principal who intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him, would be
 - a. an express agency.
 - b. a power of attorney.
 - c. an ostensible agency.
 - d. a special agency.
5. You made a statement that induced a person to act as a result of relying on that statement. The legal principle that now prevents you from asserting facts that are contrary to your previous declaration is known as
 - a. estoppel.
 - b. ratification.
 - c. respondeat superior.
 - d. laches.
6. Broker Thomas, who was not your agent, told prospective tenants that he was your agent to lease your property. Thomas leased your property, and you accepted the rent from the tenant. You may *NOT* now deny the agency because of
 - a. ratification.
 - b. interest coupled with the agency.
 - c. waiver.
 - d. estoppel.

7. An undisclosed agent breached a contract with a third party. Which of the following is a *TRUE* statement as to liability for the breach?
 - a. The agent could be held personally liable.
 - b. The principal could be held liable.
 - c. The agent and the principal would be jointly liable.
 - d. Both a and b are correct.
8. A selling agent can represent
 - a. the buyer only.
 - b. both buyer and seller.
 - c. the seller only.
 - d. any of these.
9. A real estate agency disclosure form is required to be given to the buyer and the seller of
 - a. a single-family home.
 - b. a strip mall.
 - c. an office building.
 - d. all of these.
10. An agent failed to give an owner a copy of the agency disclosure form at the time the residential listing was taken. The *MOST* likely consequence for the agent will be
 - a. a fine or prison, or both.
 - b. inability to collect a commission should a sale be made.
 - c. automatic revocation of the agent's license.
 - d. no action because disclosure is required only upon sale.
11. Which is *NOT* a requirement of an agency relationship?
 - a. Compensation to the agent
 - b. Contractual capacity of principal
 - c. Loyalty of agent to principal
 - d. Full disclosure by agent to principal
12. The equal dignities rule concerns
 - a. discriminating practices.
 - b. the requirement that certain agency agreements be in writing.
 - c. ratification of unauthorized acts.
 - d. the implied authority of an agent standing in the shoes of the principal.

13. Which statement is correct as to agencies?
 - a. To be valid, an agency requires consideration.
 - b. Agents who exceed their authority will always be personally liable.
 - c. All agency duties must be expressly agreed to.
 - d. Some agency duties are implied.
14. A seller's agent, in selling a home, must
 - a. be compensated by the seller.
 - b. disclose the agency representation to both buyer and seller.
 - c. do both of these.
 - d. do neither of these.
15. A fiduciary relationship exists between
 - a. a broker and his principal.
 - b. a seller and buyer.
 - c. both of these.
 - d. neither of these.
16. A seller's listing agent is required to
 - a. reveal confidential information received from the other party.
 - b. disclose to a buyer all known material facts that affect value.
 - c. accomplish both of these.
 - d. accomplish neither of these.
17. A dual agent must
 - a. tell the buyer that the seller will accept less.
 - b. tell the seller that the buyer will pay more.
 - c. require compensation from both buyer and seller.
 - d. do none of these.
18. Agents could be held personally liable if they
 - a. claimed to be acting as a principal.
 - b. made false representations upon the direction of their principal.
 - c. exceeded their authority.
 - d. did any of these.
19. An agent exceeds a secret limitation in the agency agreement while dealing with a third party. Which statement would be correct?
 - a. The agent could be personally liable to the principal.
 - b. The third party could hold the principal liable for the agent's action.
 - c. Both of these are correct.
 - d. Neither of these is correct.

20. Which is *TRUE* about real estate agents' liability?
- a. An agent will always be liable for disobeying a principal's instructions.
 - b. An agent will not be liable for a tort committed at the direction of the principal.
 - c. The principal will never be liable for acts of the agent after termination of the agency.
 - d. An agent can be held liable for a tort committed by the agent during the agency.
21. When an agent commits a tort while carrying out agency duties, the
- a. principal has no liability for the tort.
 - b. principal would not be liable if the principal told the agent not to commit any torts.
 - c. agent is exonerated from liability for the tort because the act was committed in an agency capacity.
 - d. agent would be personally liable for the tort.
22. When broker Clyde died, he had 36 exclusive listings. The executor of his estate, who was also a broker, wanted to continue the business until it could be sold. The executor must
- a. notify the owners that he or she has taken over the duties of broker Clyde.
 - b. obtain California Department of Real Estate approval for the substitution.
 - c. renegotiate all listings.
 - d. record his authority.
23. All these events would terminate an agency *EXCEPT*
- a. the death of a corporate officer of the agent's principal.
 - b. agreement of the parties.
 - c. renunciation by the principal.
 - d. extinction of the subject matter.
24. An agency for a stated period of time would be terminated before the expiration date by all these *EXCEPT*
- a. termination by the principal without cause.
 - b. termination by the agent.
 - c. refusal of the principal to accept an offer.
 - d. destruction of the subject matter of the agency.
25. A principal may *NOT* unilaterally terminate an agency when
- a. the agency is a written agreement.
 - b. the agency is coupled with an interest.
 - c. the principal has received benefits from the agency.
 - d. consideration is due the agent.

3

UNIT THREE



DUTIES AND RESPONSIBILITIES OF LICENSEES

KEY TERMS

“as is”
blind ad
Cartwright Act
caveat emptor
Easton v. Strassburger
employee
ethics
finder’s fee
franchise
fraud
group boycotting
*Homeowner’s Guide to
Earthquake Safety*

independent contractor
latent defects
market allocation
Megan’s Law
misrepresentation
Natural Hazards Disclosure
Statement
net listing
option listing
patent defects
price-fixing
puffing
Realtist

REALTOR®
rent skimming
respondeat superior
secret profit
Sherman Antitrust Act
subagents
subordination clauses
tie-in agreements
Transfer Disclosure
Statement

LAW AND ETHICS

Ethics is not the same as legality. What is legal could still be unethical, and in some instances, conduct that passes the test of being ethical could be regarded as being illegal.

Laws are enacted to set what was considered at the time to be the minimum standards of acceptable human behavior. **Ethics** go far beyond the law and determine not whether an action is legal, but whether it is right or just.

Real estate licensees no longer simply can rely on the letter of the law in determining whether behavior is proper. They also must ask themselves if it is ethical. The time-tested method to determine whether an action is ethical is to apply the golden rule. If you would not wish to be treated in a particular manner, you know it is not ethical.

Ethics often precedes the law. Actions that formerly were legal but unethical are now often illegal as well. Court decisions have been applying the precepts of ethics to activities in real estate and determining that legal duties exist where no duties formerly were recognized. Licensees who pursue an unethical course of action run the risk of having a court determine that they have breached a duty and are liable for the resulting damages, even though such action had been considered legal in the past.

For a full understanding of the duties of licensees, the relationship among licensees must be examined.

SALESPERSON STATUS

Employee vs. Independent Contractor

The sales agent working for a broker is often regarded by members of the public as an **employee** of the broker. Every real estate broker must have a written contract with a salesperson or broker associates.

Most sales agents contract as independent contractors working in a brokerage under a broker's supervision. The broker, not the sales agent, is really the principal's agent. The sales agent is the broker's agent authorized to obtain listings, negotiate sales contracts, and provide other real estate services to the brokerage clients.

An **independent contractor** is one who is engaged to perform a duty but is not under the direct control of the principal. An independent contractor is accountable only for results. Control is the determining factor when considering employee versus independent contractor status. An independent contractor is reimbursed for results and is not subject to control and direction regarding how those results are achieved.

Most real estate brokers use contracts that specify the salesperson is an independent contractor rather than an employee. They take this measure to avoid withholding income

taxes and contributing to Social Security. The Internal Revenue Service will treat the real estate salesperson as an independent contractor if the following three criteria are met:

1. The salesperson is licensed as a real estate agent.
2. Reimbursement is based solely on sales, not on hours worked.
3. There is a written contract that specifies the salesperson will be treated as an independent contractor for tax purposes.

Brokers are liable for the torts of their employees within the scope of their employment. Likewise, independent contractor agreements do not appear to protect brokers from injury claims by salespeople under workers' compensation or claims of third parties for torts of the salesperson in the course of employment. Brokers, therefore, should obtain workers' compensation coverage as well as liability coverage. Brokers are specifically exempt from unemployment compensation insurance requirements.

By law, salespeople in California can self-designate as independent contractors. *Grubb & Ellis Company v. Spengler* (1983) 143 C.A.3d 890 indicates that real estate salespeople are not entitled to minimum wages or unemployment compensation.

CASE STUDY The case of *Barry v. Raskov* (1991) 232 C.A.3d 447 involved an investor who was induced to put \$55,000 into a \$175,000 second mortgage on a property, subject to a first trust deed of \$100,000. The broker's appraiser indicated a property value of \$400,000. The loan broker earned a \$30,000 commission on the transaction. After default, another appraisal set the value of the property at \$98,000.

The court held Raskov (the loan broker) liable for the torts of the appraiser. The court held that the fact that the appraiser may have been an independent contractor did not protect Raskov because Section 10232.5 of the Business and Professions Code requires the broker to give potential lenders a statement of the estimated fair value of the property. This duty cannot be delegated.

Note: The court refused to award punitive damages because it did not feel the evidence of fraud was clear and convincing.

Formerly, the broker had a duty to review contracts prepared by salespeople within five days. This has been replaced by a "reasonable supervision policy."

A salesperson who has a commission dispute with a broker could, as an employee, take the dispute to the state labor commissioner in the Department of Industrial Relations. (www.dir.ca.gov)

While salespeople can be compensated only by their own broker, a salesperson can be compensated directly from an escrow company if the broker issues specific instructions on a case-by-case basis for such direct payment.

WEB LINK



CASE STUDY The case of *Sanowicz v. Bacal* (2015) 234 C.A.4th 1027 involved an agreement between two salespeople in the same office. Salesperson 1 introduced a prospective seller to salesperson 2 with an agreement that they would share any commission earned. Salesperson 2 changed broker firms and earned a commission of \$210,000 on the sale of the seller's property. The first agent sued agent 2 for half the commission. The trial judge ruled that real estate salespeople must receive their compensation only from their employing broker and cannot share commissions.

The Court of Appeal reversed, ruling that Section 10137 does not forbid sharing agreements between real estate salespeople.

Note: The decision did not address the commission rights of the broker of agent 1.

Because brokers can be held liable for the torts of their salespeople within the scope of employment (the doctrine of **respondeat superior**), the broker should ascertain that all salespeople carry and maintain adequate automobile insurance coverage. In addition, brokers should strongly consider maintaining a high-limit general liability policy, as well as an errors and omissions policy (malpractice) that covers the broker and salespeople for negligence but not for intentional acts, such as misrepresentation. Salespeople may obtain their own errors and emissions policy if not covered by their broker.

Due to their potential liability, many brokers astutely check references and past employers of prospective salespeople. A salesperson who places his own interests above honesty to all parties could mean financial ruin for his broker.

Franchisees

A **franchise** is a right to operate under a common name and marketing plan. Many large real estate firms are franchises.

Franchisees are independent contractors, and the franchisor is not liable for the wrongful acts of the franchisee. If, however, the actions of the franchisor and the franchisee are such that third parties could assume that the franchisee is an agent, the franchisor could be held liable for the acts of the franchisee. The franchisor should, therefore, make certain that advertising clearly reveals that the franchisee is an independent operator.

AGENT'S DUTIES TO THE PRINCIPAL

An agent's primary responsibility is to the principal, the owner of property listed for sale or lease, or the buyer.

In listing property, the agent has a duty to ascertain the value of the property. An agent could be held liable for suggesting a sales price that was too low and could not be justified by acceptable appraisal methods. Even if the owners suggest a sales price, the agent, as a real estate specialist, has a duty to provide the owner with a supported opinion of value.

An agent could not knowingly arrange a sale of the principal's property at an amount significantly less than market value and escape liability with the defense that the owner set the price and did not ask the agent what the property was worth.

Agents must protect their principals. Sharp operators often seek to trade property of dubious value or to get sellers to accept offers that are not what they appear to be and are not in the sellers' best interests. The owner must be warned about offers with **subordination clauses**. Subordination clauses allow later loans to take priority over seller financing and endanger the seller's security in the property. They allow the purchaser to wipe out the seller's security interest by placing priority liens against the property. The owner also must be warned about exchanges involving trust deeds on other properties and about any transaction in which the purchaser will end up receiving cash.

Another fraudulent activity is **rent skimming**, where a purchaser takes possession with little if any down payment but promises the seller will be "cashed out" in a short period of time. Usually, the false promise involves the close of a nonexistent escrow. The buyer then rents the property, keeping rent receipts and making no payments. The definition of rent skimming has now been expanded to include collecting rents and deposits for property not owned or controlled by the landlord (Civil Code Section 890). The penalty for rent skimming is three years' imprisonment and a fine up to \$10,000.

In general, the agent must caution the seller about any transaction in which the seller's interests are in any way endangered.

The agent must protect the principal from the fraud of others. In exchange situations, the broker should make no representation about value that has not been appraised adequately, and the agent should provide the basis for the appraisal. The agent should suggest that expert help be obtained for situations beyond the agent's ability.

CASE STUDY In the case of *Schoenberg v. Romike Properties* (1967) 251 C.A.2d 154, a real estate agent induced the plaintiffs to part with valuable property in exchange for worthless security. The defendants told the owner that the buyer's security was better than taking security on the property sold. The agent failed to inform the owner that no investigation of the value of the security taken was made and that the agent had no knowledge of its true value. The agent had accepted an appraisal made for the owner that set value at 10 times the real value. The court held that the plaintiffs had a right to rely on the defendants' statements and had no duty to make an independent investigation. The defendants' actions were held to be, at the very least, culpable negligence, and the buyer's fraud was held not to excuse that negligence.

The agent has a duty to reveal all pertinent information. For example, in a transaction where the seller is financing the buyer, the fact that the buyer borrowed the down payment could be pertinent. The agent should not make statements about the creditworthiness of the buyer unless such statements can be supported by fact. As protection from later owner

claims of credit misrepresentation, the agent should arrange for a credit report on the purchaser.

An agent must disclose all offers, including oral offers. The agent must keep the principal informed on all matters likely to influence decision making. Included would be offers received after an offer has been accepted, right up to the close of escrow. However, acceptance of a second offer after a first offer has already been accepted should be conditioned on the seller's release from the first offer. Such a second offer is called a *backup offer*.

If acceptance of an offer is not in the principal's best interests, the agent must be careful not to encourage its acceptance. An agent could be liable for abusive pressure on a principal. Present case law does not indicate that an agent has an affirmative duty to recommend rejection of offers the agent believes to be unreasonable. However, because of the fiduciary relationship between the agent and the principal, a future decision about this duty is conceivable.

The agent cannot make a **secret profit**. The agent works for the principal and is entitled only to the compensation agreed on. The fact that the principal received a good price and was treated fairly is immaterial. The principal is entitled to any secret profit the agent receives. As an example, if the agent were in fact the purchaser through secret control of a corporation that purchased the property, the agent would have to give up the profit made on the subsequent resale. In addition, the agent would have to return any commission received because the agent breached her fiduciary duty.

If a buyer intends to relist the property or another property with the agent, the agent has a duty to reveal the fact that the owner's acceptance of an offer would put the agent in a position of being able to earn another commission.

The agent has a duty of confidentiality. The seller's agent could be held liable for revealing to a purchaser, without the owner's authorization, information that weakens the principal's bargaining ability. The agent's duty of confidentiality continues even after the expiration of the agency. An agent who later uses confidential information obtained through the agency relationship to the detriment of the former principal is breaching his fiduciary duty.

An agent could be liable for negligence in drafting an agreement and should consider the potential liability before attempting to draft any agreement or make major modifications to a printed contract. Obtaining professional legal assistance should be considered. An agent must avoid the unauthorized practice of law. An agent's duty does not extend to giving tax advice to buyers and sellers.

CASE STUDY The case of *Carleton v. Tortosa* (1993) 14 C.A.4th 745 concerned an experienced investor, Carleton, who listed property for sale. Carleton asked the agent how many days he had to reinvest the sale proceeds. The agent told the owner to “ask your tax person.” Carleton was unable to reach his accountant, but the accountant’s assistant told Carleton that he had 45 days. After the sale, Carleton learned he owed approximately \$34,000 in taxes. Carleton sued the agent for professional negligence in failing to recognize a tax-deferred exchange situation. The Court of Appeal emphasized that a real estate agent has no duty to give tax advice. The listing statement, “A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional,” strengthened the agent’s defense.

Note: If the agent had given tax advice, the agent could have been found negligent and liable for damages.

Net Listings

Under a **net listing**, the agent’s commission is all money received for a property over a net amount set in the listing. Illegal in a number of other states, net listings are legal in California. However, serious conflict-of-interest problems can arise. The broker is no longer working simply to consummate a sale but wants a sale at as much over the listing price as possible. In setting the net price, the agent’s best interest therefore is served by as low a price as possible. That is contrary to the principal’s best interests.

Before or at the time of acceptance of an offer on a net listing, the broker must disclose to the principal the amount of commission to be received (Business and Professions Code Section 10176(g)). If the licensee makes an extraordinary profit from a net listing, the owner may claim that the agent, in helping to set the list price, was acting in a self-serving manner and therefore breached his or her duties of financial trust. A net listing could very well be an invitation to a lawsuit.

The ethical conflict of net listings, the danger of being successful without earning a fee as well as the greater likelihood of an expensive lawsuit and ill will, has resulted in very few brokers being willing to accept a net listing.

Option Listings

In an **option listing**, the broker takes a listing combined with an option to purchase. This places the broker in the dual role of agent and principal. To exercise the option, the agent would have to reveal all offers received. This probably extends to oral offers as well as written ones.

Section 10176(h) of the Business and Professions Code requires the agent to reveal fully, in writing, the amount of profit and to obtain the principal’s written consent to the amount of profit. The withholding of approval could prevent the exercise of the option.

In a combined listing-option agreement, the broker also should make certain the owner understands that the exercise of the option is at the broker's discretion. The listing-option agreement is not a guaranteed sales agreement in which the broker agrees to purchase in the event a buyer is not found.

Agent as Buyer

When a licensee is acting as a principal, the agent should inform the buyers and the sellers that he, while a licensed real estate agent, is dealing as a principal and not in an agency capacity.

Full disclosure could extend beyond revealing that the purchaser is an agent and is associated with the listing firm to revealing the motives or intentions of the purchaser. An agent who intends to purchase the property for resale should disclose not only that fact but also what the agent hopes to obtain and any possible purchasers then known to the agent. If the agent intends to do work on the property to make the property more valuable, the agent should disclose these intentions.

Some firms will not allow any of their salespeople or brokers to purchase office listings because they feel that the firm and the purchaser also could be buying litigation. Because the agent has the duty to represent the owner and the owner's best interests, the principal should have the opportunity to use the expertise of the agent to the principal's advantage and not have the principal's property used by the agent in a self-serving manner. In purchasing an office listing, the agent appears to be putting self-interest above the interests of a client, which violates the agent's fiduciary duties. Courts are likely to determine that an agent was acting in a self-serving manner rather than protecting the interests of the principal if there is evidence that the purchase price was substantially below market value.

If the agent helped set the list price and purchased at the list price or less and then sold at a profit, a court very likely would determine that the agent purposely set the price too low. Action such as this could result in not only compensatory damages but also punitive damages.

Even if the owner set the list price, the agent would have a duty of financial trust to inform the owner of the property's value. If the agent accomplished a rapid resale at a profit, the courts would be more likely to determine that the agent breached her duty of full disclosure. The courts could determine that the agent made a secret profit, which would then have to be turned over to the principal.

When property is purchased by an agent and resold at a profit, the courts are likely to burden agents with proving that full disclosure has been made. As a means of protection, agents should prepare a complete disclosure of all material facts, including their intentions, and have it signed by the sellers before the purchase agreement.

Even with full disclosure, courts could determine that undue influence was used to obtain an agreement based on the principal-agent relationship of trust. Additional protection against such claims would require that the seller obtain independent legal counsel and that the seller's attorney also receive all disclosures.

Disclosures also should be made when the purchaser is related to the agent by blood or marriage or connected by a strong business or social relationship. If an appearance of impropriety exists, courts are likely to determine that a duty was breached.

Even if an agent prevails in a lawsuit, a suit by a client can damage a firm's reputation and be costly in time and money.

CASE STUDY The case of *Horning v. Shilberg* (2005) 13 C.A.4th 197, involved a licensed broker, Horning who prepared a purchase agreement whereby Horning would buy Shilberg's property as a principal and receive 3% of the purchase price as compensation for services at close of escrow.

After a breach of contract, the appellate court noted in its affirmation of the trial court that although Shilberg breached the contract, "Horning suffered no damages because a broker acting as principal in a transaction is not entitled to receive a commission as a matter of law." Because Horning suffered no damages, the court ruled that Shilberg was the prevailing party and entitled to attorney fees and costs.

Note: Real estate licensees acting on their own behalf in a real estate transaction are not acting as a broker within the meaning of Business and Professions Code 10131. A purported commission is simply a reduction in price to be paid.

CASE STUDY In the case of *In re Estate of De Harte* (1961) 196 C.A.2d 452, a broker neglected to inform the administrator of an estate that the purchaser was his mother. Seventeen days after the sale was approved for \$9,600, the purchaser entered into an agreement to sell the property for \$11,900. The agreement was arranged by the broker. The court held that the good-faith duties of an agent preclude the agent from taking an adverse position. The court considered this sale a fraud on the court and the administrator. The sale and the prior confirmation of the broker's commission were vacated by the court.

AGENT'S DUTIES TO BUYERS

Caveat Emptor

"Let the buyer beware" was formerly a precept of business. It was the buyer's duty to inspect the property and her own fault if there were any problems with the property.

Caveat emptor is not the law of California, which requires disclosure of known defects. While ignorance was once bliss in that an agent did not have to disclose what the agent did not know, the agent now has duties to know about property offered for sale.

The Easton Case

Now, not only must an agent disclose detrimental facts known about a property, but the case of *Easton v. Strassburger* (1984) 152 C.A.3d 90 determined that the agent also has an *affirmative duty* to find out material facts. A broker's duty of disclosure applies to facts that should be known, as well as known facts. In this case, a home was sold for \$170,000 through a broker. After the sale, the property suffered extreme damage in a landslide. Repair costs were estimated at \$213,000.

The court held that the duties of the real estate broker include "the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value of the property that such an investigation would reveal."

In the *Easton* case, a reasonable inspection would have revealed the problem because testimony indicated that

- a listing agent had seen netting on a hill used to repair a prior landslide,
- at least one agent knew the house was built on filled land, and
- the floor of the guesthouse was known not to be level.

The court in the *Easton* case indicated that its decision did not necessarily apply to commercial transactions, in which buyers are likely to be more sophisticated.

The California Supreme Court declined to hear the *Easton* case, which makes the decision an authority for the duties of licensees.

California Civil Code Section 2079 et seq. was passed to codify, clarify, and modify the duties imposed by the *Easton* decision. According to the *Real Estate Bulletin*, the impact of the bill can be summarized as follows:

- It (the bill) mandates only a reasonably competent visual inspection of the property. The decision in *Easton* does not clearly indicate the type of inspection required.
- The duty to make the visual inspection is limited to residential real property of one to four units. The duty in *Easton* was limited to residential property.
- It defines the standard of care owed by a broker to a prospective purchaser as the degree of care a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination required to obtain a real estate license under California law. *Easton* did not clearly define the measure of the standard of care owed by a broker to the buyer.
- It would apply the duty only to a broker who has entered into a written contract with the seller to find or obtain a buyer, and to a broker who acts in cooperation with such a (listing) broker to find and obtain a buyer. *Easton* did not limit its application to brokers with written contracts, nor did it impose a duty on cooperating brokers.

- It provides that the duty of inspection does not include or involve areas that are reasonably and normally inaccessible to such inspection or to inspection of common areas in common interest subdivisions if the seller or the broker supplies the prospective buyer with the documents and information specified in Civil Code Section 1360. *Easton* did not address the issue of the scope of the inspection.
- It established a two-year statute of limitations that runs from the date of recordation, close of escrow, or occupancy, whichever occurs first.
- It provides that buyers or prospective buyers have a duty to exercise reasonable care to protect themselves, including knowledge of adverse facts that are known to or within the diligent attention and observation of the buyer or prospective buyer. *Easton* stated that a buyer has a duty to make a reasonable inspection but did not limit its application to cases where the facts were not known but determinable by a diligent inspection or observation by the buyer.
- Although not directly related to the duties imposed under *Easton*, the bill provides that no professional liability insurer may exclude under its policy coverage for liability arising as a result of a breach of the duty established by the *Easton* decision.

Oral and Written Disclosures

The duty of a seller to disclose relevant facts concerning the property for sale can be found in California statutes, case law, and real estate law.

Section 1102 of the Civil Code requires that a seller of one to four residential units provide a written disclosure of known property defects to a purchaser. To comply with this disclosure requirement, the Real Estate Transfer Disclosure Statement is used to comply with the statutory requirements.

Transfer Disclosure Statement

Shown in Figure 3.1, the **Real Estate Transfer Disclosure Statement (TDS)** requires sellers to disclose defects that are known to them. The seller certifies that the information given is true and correct to the seller's knowledge. Defects are not limited to the physical aspects of the property but also include items such as zoning violations and nuisances in the area. The seller's agent and the cooperating agent (if applicable) also execute this disclosure statement, indicating the existence of defects based on a reasonably competent and diligent visual inspection of the accessible areas of the property. The form also advises purchasers that they may wish to obtain professional advice or their own inspection of the property.

FIGURE 3.1: Real Estate Transfer Disclosure Statement

	CONDITION OF PROPERTY Transfer Disclosure Statement (TDS)		
<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none;"> Prepared by: Agent _____ Broker _____ </td> <td style="width: 50%; border: none;"> Phone _____ Email _____ </td> </tr> </table>		Prepared by: Agent _____ Broker _____	Phone _____ Email _____
Prepared by: Agent _____ Broker _____	Phone _____ Email _____		
<p>NOTE: This form is used by the seller and their agent when marketing a one-to-four unit residential property for sale in compliance with mandated disclosures on the physical and environmental condition of the property, to provide prospective buyers as soon as possible on the commencement of negotiations with property information including known or suspected property defects affecting value.</p>			
<p>This disclosure statement is prepared for the following:</p> <p> <input type="checkbox"/> Seller's listing agreement <input type="checkbox"/> Purchase agreement <input type="checkbox"/> Counteroffer <input type="checkbox"/> _____ </p> <p> dated _____, 20____, at _____, California, entered into by _____, and _____, regarding property referred to as _____ </p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>			
REAL ESTATE TRANSFER DISCLOSURE STATEMENT			
<p>THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS _____</p> <p>_____</p> <p>_____</p> <p>_____</p>			
<p>THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF _____, 20____. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.</p>			
I			
COORDINATION WITH OTHER DISCLOSURE FORMS			
<p>This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zones and purchase-money liens on residential property).</p> <p>Substituted Disclosures: The following disclosures and other disclosures required by law, including the Natural Hazard Disclosure Report/Statement that may include airport annoyances, earthquake, fire, flood, or special assessment information, have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:</p> <p> <input type="checkbox"/> Inspection reports completed pursuant to the contract of sale or receipt for deposit. <input type="checkbox"/> Additional inspection reports or disclosures: _____ </p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>			
-----PAGE 1 OF 5 — FORM 304 -----			

FIGURE 3.1: Real Estate Transfer Disclosure Statement (continued)

----- PAGE 2 OF 5 — FORM 304 -----

II**SELLER'S INFORMATION**

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER:

Seller ☐ is, ☐ is not, occupying the property.

A. The subject property has the items checked below (read across):*

- | | | |
|-------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|---------------------------------------------------------------------------|
| <input type="checkbox"/> Range | <input type="checkbox"/> Oven | <input type="checkbox"/> Microwave |
| <input type="checkbox"/> Dishwasher | <input type="checkbox"/> Trash compactor | <input type="checkbox"/> Garbage Disposal |
| <input type="checkbox"/> Washer/Dryer Hookups | | <input type="checkbox"/> Rain Gutters |
| <input type="checkbox"/> Burglar Alarms | <input type="checkbox"/> Carbon Monoxide Device(s) | <input type="checkbox"/> Fire Alarm |
| <input type="checkbox"/> TV Antenna | <input type="checkbox"/> Satellite Dish | <input type="checkbox"/> Intercom |
| <input type="checkbox"/> Central Heating | <input type="checkbox"/> Central Air Conditioning | <input type="checkbox"/> Evaporator Cooler(s) |
| <input type="checkbox"/> Wall/Window Air Conditioning | <input type="checkbox"/> Sprinklers | <input type="checkbox"/> Public Sewer Systems |
| <input type="checkbox"/> Septic Tank | <input type="checkbox"/> Sump Pump | <input type="checkbox"/> Water Softener |
| <input type="checkbox"/> Patio/Decking | <input type="checkbox"/> Built-in Barbecue | <input type="checkbox"/> Gazebo |
| <input type="checkbox"/> Sauna | <input type="checkbox"/> Water-conserving plumbing fixtures* | |
| <input type="checkbox"/> Hot Tub <input type="checkbox"/> Locking Safe Cover* | <input type="checkbox"/> Pool <input type="checkbox"/> Child Resistant Barrier* | <input type="checkbox"/> Spa <input type="checkbox"/> Locking Safe Cover* |
| <input type="checkbox"/> Security Gate(s) | <input type="checkbox"/> Automatic Garage Door Opener(s)* Number of Remote Controls: _____ | |

Garage: ☐ Attached ☐ Not Attached ☐ Door Opener(s)* ☐ Carport ☐ Not Attached
☐ Electrical vehicle charging station ☐ Separately metered

Pool/Spa Heater: ☐ Gas ☐ Solar ☐ Electric

Water Heater: ☐ Gas* ☐ Private Utility or Other: _____

Water Supply: ☐ City ☐ Well

Gas Supply: ☐ Utility ☐ Bottled (Tank)

☐ Window Screens ☐ Window Security Bars

☐ Quick-Release Mechanism on Bedroom Windows*

Exhaust Fan(s) in _____ 220 Volt Wiring in _____

Fireplace(s) in _____ Gas Starter _____

Roof(s): Type _____ Age: _____ (approx.)

Other: _____

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? ☐ Yes ☐ No.

If yes, then describe. (Attach additional pages if necessary): _____

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? ☐ Yes ☐ No.

If yes, check appropriate boxes below.

- | | | | | | |
|-----------------------------------------|-----------------------------------|-------------------------------------|-----------------------------------------|-------------------------------------|------------------------------------|
| <input type="checkbox"/> Interior Walls | <input type="checkbox"/> Ceilings | <input type="checkbox"/> Floor | <input type="checkbox"/> Exterior Walls | <input type="checkbox"/> Insulation | <input type="checkbox"/> Roof(s) |
| <input type="checkbox"/> Windows | <input type="checkbox"/> Doors | <input type="checkbox"/> Foundation | <input type="checkbox"/> Slab(s) | <input type="checkbox"/> Driveways | <input type="checkbox"/> Sidewalks |

----- PAGE 2 OF 5 — FORM 304 -----

FIGURE 3.1: Real Estate Transfer Disclosure Statement (continued)

----- PAGE 3 OF 5 — FORM 304 -----

☐ Walls/Fences ☐ Electrical Systems ☐ Plumbing/Sewers/Septics
☐ Other Structural Components (Describe): _____

If any of the above is checked, explain. (Attach additional pages if necessary): _____

☐ Addendum attached. [See **RPI** Form 250]

*Installation of a listed appliance, device, or amenity is not a precondition of sale or transfer of the dwelling. The carbon monoxide device, garage door opener, or child-resistant pool barrier may not be in compliance with the safety standards relating to, respectively, carbon monoxide device standards of Chapter 8 (commencing with Section 13260) of Part 2 of Division 12 of, automatic reversing device standards as set forth in Chapter 12.5 (commencing with Section 19890) of Part 3 of Division 13 of, or the pool safety standards of Article 2.5 (commencing with Section 115920) of Chapter 5 of Part 10 of Division 104 of, the Health and Safety Code. Window security bars may not have quick-release mechanisms in compliance with the 1995 edition of the California Building Standards Code. Section 1101.4 of the Civil Code requires all single family residences built on or before January 1, 1994, to be equipped with water-conserving plumbing fixtures after January 1, 2017. Additionally, on and after January 1, 2014, a single family residence built on or before January 1, 1994, that is altered or improved is required to be equipped with water-conserving plumbing fixtures as a condition of final approval. Fixtures in this dwelling may not comply with Section 1101.1 of the Civil Code.

C. Are you (Seller) aware of any of the following:

1. Substances, materials or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, mold, fuel or chemical storage tanks, and contaminated soil or water on the subject property..... ☐ Yes ☐ No
2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property..... ☐ Yes ☐ No
3. Any encroachments, easements or similar matters that may affect your interest in the subject property..... ☐ Yes ☐ No
4. Room additions, structural modifications, or other alterations or repairs made without necessary permits..... ☐ Yes ☐ No
5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes..... ☐ Yes ☐ No
6. Fill (compacted or otherwise) on the property or any portion thereof..... ☐ Yes ☐ No
7. Any settling from any cause, or slippage, sliding, or other soil problems..... ☐ Yes ☐ No
8. Flooding, drainage or grading problems..... ☐ Yes ☐ No
9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides..... ☐ Yes ☐ No
10. Any zoning violations, nonconforming uses, violations of "setback" requirements..... ☐ Yes ☐ No
11. Neighborhood noise problems or other nuisances..... ☐ Yes ☐ No
12. CC&Rs or other deed restrictions or obligations..... ☐ Yes ☐ No
13. Homeowners' Association which has any authority over the subject property..... ☐ Yes ☐ No
14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)..... ☐ Yes ☐ No
15. Any notices of abatement or citations against the property..... ☐ Yes ☐ No
16. Any lawsuits by or against the Seller threatening to or affecting this real property, claims for damages by the Seller pursuant to Section 910 or 914 threatening to or affecting this real property, claims for breach of warranty pursuant to Section 900 threatening to or affecting this real property, or claims for breach of an enhanced protection agreement pursuant to Section 903 threatening to or affecting this real property, including any lawsuits or claims for damages pursuant to Section 910 or 914 alleging a defect or deficiency in this real property or 'common areas' (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)..... ☐ Yes ☐ No

If the answer to any of these is yes, explain. (Attach additional pages if necessary): _____

☐ Addendum attached. [See **RPI** Form 250]

----- PAGE 3 OF 5 — FORM 304 -----

FIGURE 3.1: Real Estate Transfer Disclosure Statement (continued)

----- PAGE 4 OF 5 — FORM 304 -----

- D. 1. The Seller certifies that the property, as of the close of escrow, will be in compliance with Section 13113.8 of the Health and Safety Code by having operable smoke detector(s) which are approved, listed, and installed in accordance with the State Fire Marshal's regulations and applicable local standards.
2. The Seller certifies that the property, as of the close of escrow, will be in compliance with Section 19211 of the Health and Safety Code by having the water heater tank(s) braced, anchored, or strapped in place in accordance with applicable law.

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller: _____ Date: _____, 20____

Seller: _____ Date: _____, 20____

III**AGENT'S INSPECTION DISCLOSURE**

(To be completed only if the Seller is represented by an agent in this transaction.)

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING:

☐ Agent notes no items for disclosure.

Agent notes the following items: _____

Agent: _____ CalBRE#: _____
 (Broker Representing Seller - Please Print)

By: _____ Date: _____, 20____
 (Associate Licensee or Broker Signature)

IV**AGENT'S INSPECTION DISCLOSURE**

(To be completed only if the agent who has obtained the offer is other than the agent above):

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING:

☐ Agent notes no items for disclosure.

Agent notes the following items: _____

Agent: _____
 (Broker Obtaining Seller - Please Print)

By: _____ Date: _____, 20____
 (Associate Licensee or Broker Signature)

----- PAGE 4 OF 5 — FORM 304 -----

FIGURE 3.1: Real Estate Transfer Disclosure Statement (continued)

----- PAGE 5 OF 5 — FORM 304 -----

V

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER(S) AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller: _____ **Date:** _____, 20____

Seller: _____ **Date:** _____, 20____

Buyer: _____ **Date:** _____, 20____

Buyer: _____ **Date:** _____, 20____

Agent: _____ **CalBRE:** _____

(Broker Representing Seller - Please Print)

By: _____ **Date:** _____, 20____

(Associate Licensee or Broker Signature)

Agent: _____ **CalBRE:** _____

(Broker Obtaining the Offer- Please Print)

By: _____ **Date:** _____, 20____

(Associate Licensee or Broker Signature)

SECTION 1102.3 OF THE CIVIL CODE PROVIDES A BUYER WITH THE RIGHT TO RESCIND A PURCHASE CONTRACT FOR AT LEAST THREE DAYS AFTER THE DELIVERY OF THIS DISCLOSURE IF DELIVERY OCCURS AFTER THE SIGNING OF AN OFFER TO PURCHASE. IF YOU WISH TO RESCIND THE CONTRACT, YOU MUST ACT WITHIN THE PRESCRIBED PERIOD.

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

CASE STUDY The case of *Realmuto v. Gagnard* (2003) 110 C.A.4th 193 involved two investors who signed a purchase contract to buy a residence for \$683,000 with the intention of assigning the property to an Indian tribe for a casino. Because the tribe never agreed to buy the property, the buyers did not complete their purchase. The seller sued the buyers for specific performance to force the buyers to complete the purchase (the liquidated damages clause in the purchase agreement was not initialed by the parties). The purchasers responded that the seller had never delivered the TDS as required by Civil Code 1102 for sellers of one to four residential units.

The superior court granted summary judgment for the buyers because the TDS had never been delivered and failure to deliver cannot be waived. The Court of Appeal affirmed.

"The delivery of a TDS is a nonwaivable condition precedent to the buyer's duty of performance." The buyer not requesting a TDS cannot be construed as a waiver. The court noted that after delivery of the TDS, the buyer has three days to rescind the sale.

The disclosure of known facts includes any negative fact that would be likely to influence a purchaser's decision. The presence of minority group members in the area is not considered a detrimental fact and should not be revealed. In fact, providing such information to a buyer likely would be considered steering, which would be a violation of the Civil Rights Act of 1968.

CASE STUDY In the case of *Michel v. Moore & Associates* (2007) 156 C.A. 4th 756, Kirkpatrick was an agent for Larry Moore & Associates and made a pre-listing inspection of a home, noting pool cracks. The listing was not awarded to Kirkpatrick but given six months later to Fred Sands. Buyer Michel made an offer through Larry Moore & Associates. Kirkpatrick, a transaction coordinator at Larry Moore & Associates, reviewed the transfer disclosure statement but did not include information on the pool based on his prior inspection. Cracks later appeared in the house and pool. A soil report revealed settling of 3½ inches. Costs to repair the property would be \$500,000. Michel sued the seller, Fred Sands, and Larry Moore. The seller went bankrupt, Fred Sands settled for \$50,000, and the case against Larry Moore & Associates went to trial. The jury decided in favor of Larry Moore & Associates, ruling they did not conceal a material fact and did not fail to reveal material facts disclosed by a reasonably competent visual inspection.

The Court of Appeal reversed and ordered the case retried, holding that the jury should have been instructed as to negligent concealment. While a broker might conduct a competent inspection and reveal all material facts, the broker still could be liable as to fiduciary duty to fail to disclose other finds that the broker knew or should have known.

Note: This case expands broker liability for disclosure beyond the TDS to knowledge gained from other sources.

The Real Estate Transfer Disclosure Statement is not required for business and income property. In the sale of income property or business opportunities, reliance by the buyer on false information likely could result in a lawsuit involving the broker. The broker, whenever possible, should attempt to verify figures from the owner's income tax returns or sales tax reports, or both. The broker should never report income and expense figures as fact but should state that they come only from the owner and should note if and how they were verified.

An agent cannot avoid full disclosure by using words such as “**as is**” in the sale of residential property. “As is” means the property is being sold in its present condition and the seller will not pay for any repairs. Courts generally have held that “as is” applies only to specific named items or to obvious defects that would be seen by a buyer (**patent defects**). Courts have held that “as is” does not protect an agent from known **latent defects**—those unlikely to be disclosed by an inspection. Exceptions include probate, tax, and foreclosure sales where the sale may be “as is.”

If a seller-required disclosure is received by the buyer after execution of a purchase agreement, the buyer has three days after delivery in person (five days after mail delivery) to terminate the offer or agreement.

Mobile Home Transfers

A mobile home transfer disclosure statement, similar to the one- to four-unit residential transfer disclosure statement, is required upon transfer of a personal property mobile home or manufactured home. The agents also are required to make a visual inspection.

Natural Hazards

The transferor of one to four residential units built before January 1, 1960, must give a buyer the booklet *Homeowner's Guide to Earthquake Safety* before the transfer and disclose any known deficiencies, such as absence of anchor bolts, unreinforced masonry walls, unanchored water heater, et cetera. The seller or his agent must also complete a **Natural Hazards Disclosure Statement** that indicates whether the property is in a special flood hazard area, an area of potential flooding, a very high fire hazard severity zone, a wildlife area that may contain substantial fire risks and hazards, an earthquake fault zone, or a seismic hazard zone.

CASE STUDY In the case of *Geernaent v. Mitchell* (1995) 31 C.A.4th 601, a seller indicated that there were no foundation problems and modifications made were to code. True facts were apparently concealed in order to make the sale. The house was sold and then resold. The buyer sued the original owner for misrepresentation. The trial court held that homeowners could not sue a prior owner for alleged fraudulent misrepresentations because the misrepresentations were not made directly to the plaintiffs.

The appeals court held that a seller can be liable to subsequent buyers for misrepresentations made to previous buyers even if there is no privity of contract (privity of contract refers to a mutual relationship as to the contract, such as being a party to the contract). The court pointed out that the plaintiff still had the burden of showing that defendants could reasonably expect subsequent purchasers to rely on their misrepresentation.

It is in the best interests of the seller, as well as the buyer, for the seller to disclose all potential problems of the property. Revealing possible problem areas not only alerts the buyers but also protects the seller against later claims of misrepresentation.

Death on the Premises

A death on the premises within three years of the date of an offer is considered a material fact and must be disclosed. After three years, a death from any cause need not be disclosed.

AIDS Disclosure

Should a broker reveal that a tenant or owner had AIDS (acquired immunodeficiency syndrome) or suspected AIDS? The risk of slander if the agent were mistaken and the question of whether the presence of AIDS is a material fact requiring disclosure were discussed at length within the real estate and legal professions. The situation was resolved by Civil Code Section 1710.2, which provides that neither the owner nor the agent are liable to the transferee for failing to disclose that an occupant was afflicted with HIV or AIDS.

Opinion 95-907 of the California Attorney General indicates that an agent need not disclose the nearby location of a licensed care facility or domestic violence shelter servicing six or fewer people (a larger facility might require disclosure).

Megan's Law

Megan's Law concerns the registration of sex offenders and making information regarding sex offenders available to the public. Civil Code Section 2079.10(a) now requires that every lease or rental agreement for residential real property and every contract for the sale of one to four residential units must include a specific notice informing consumers of the available public information regarding registered sex offenders at local police and sheriff's offices, as well as at www.meganslaw.ca.gov.

WEB LINK



Other Disclosures

There are a number of other disclosures, including the following:

- Construction defects and breach of warranty claims
- Mello-Roos bonds
- Farming area disclosure
- Mining operations disclosure
- High-risk fire area
- State tax withholding requirements
- Foreign investment in real property tax withholding
- Presence of carbon monoxide detectors
- Energy conservation and thermal insulation disclosure
- Importance of home inspection notice (Home inspectors are prohibited from giving an opinion of value.)
- Home energy rating system
- Nonresidential energy use disclosure
- Water conservation plumbing
- Smoke detector notice
- Carbon monoxide detector
- Homeowners association disclosures
- Military ordnance locations
- Window security bar presence
- Water heater bracing
- Septic system disclosure
- Methamphetamine contamination order
- Industrial/airport disclosure
- Gas or hazardous liquid transmission repairs
- Title insurance importance
- Supplemental tax bill disclosure
- Negotiability of real estate commission
- Sales price
- Environmental hazards
- Structural pest control inspection and certification report
- Affiliated business arrangement disclosure

There are also a number of finance disclosures.

The California Department of Real Estate publishes a booklet on disclosures. It is available at no charge at www.dre.ca.gov/files/pdf/re6.pdf.

The Unsophisticated Buyer

Court decisions seem to indicate that an agent has greater duties when dealing with an unsophisticated party than when dealing with a sophisticated party. With an unsophisticated buyer, the agent should ascertain that the purchaser fully understands the effect of balloon payments, points, and other matters that might not be obvious to such a buyer.

CASE STUDY The case of *Jue v. Smiser* (1994) 23 C.A.4th 312 involved a late disclosure. Buyers contracted to buy a home represented to have been designed by renowned architect Julia Morgan. The name Julia Morgan added to the prestige value of the property. Apparently, the sellers had some doubt as to their prior representation, because three days before the close of escrow, the sellers asked the buyers to sign a document acknowledging that there were no plans available that verified the architect. The buyers refused to sign but went through with the purchase. Then, discovering the house was not designed by Julia Morgan, the buyers sued the sellers and their broker for misrepresentation. The trial court held that there was no reliance on the misrepresentation because of the disclosure before the closing of escrow.

The Court of Appeal reversed the trial court, holding that it is not necessary that there be continuing reliance until the contract is executed.

Note: While full disclosure of detrimental facts learned is required before closing, the disclosure might not be enough to avoid liability. In a case such as this, the last-minute disclosure could place buyers in a position where they would have to complete the purchase or be homeless.

CASE STUDY The case of *Salahutin v. Valley of Calif. Inc.* (1994) 24 C.A.4th 555 involved buyers who, in 1979, told a real estate agent that they wanted to buy a home that could eventually be divided into two lots (for each of their children). The agent found a home listed by another agent, and the MLS listing said "1 Acre+".

The agent knew that the Hillsborough property had to be at least 1 acre to allow a future lot split. In 1989, the buyers discovered that the lot contained only 0.998 acres, so it could not be split. The value of the parcel was \$175,000 less than it would have been if a split were possible. The court held that the selling broker had a fiduciary duty either to investigate the size of the lot or to tell the buyer he had not done so, as size was of significant importance to the buyers.

Constructive fraud can occur when the broker is merely an innocent conduit of misinformation. The court applied damages based on the value at the time of discovery of the fraud rather than at the time of purchase. (The buyers paid only \$274,000 in 1979, but it would have been worth \$1,100,000 in 1989 if it could have been subdivided.)

Note: If any representation by the owner or listing broker is of importance to a buyer, the selling broker should check it out or disclose to the buyer that it is the representation of another, which she has not verified.

If an unsophisticated buyer requested property tax information, the agent probably would have the duty to explain that past property taxes are not indicative of what property taxes will be in the future because upon its sale, the property will be reassessed based on the sale price. The base tax will be 1% of sale price plus local assessments. The annual tax increase can be up to 2%.

Agents should avoid discouraging prospective buyers from obtaining professional help, such as an attorney or a fee appraiser, and should take care not to convey a false sense of urgency. Such actions would adversely affect a broker's defense in a lawsuit involving a breach of duty or fraud.

Even when an agent is not involved in aiding the buyer to obtain a loan, agents should warn unsophisticated buyers about predatory lending tactics that could lead to unnecessary expense and even foreclosure.

If an agent knows that a contemplated use is not allowed or is unlikely to be allowed because of zoning or other restrictions, the agent has an affirmative duty to tell the buyer.

Fraud, Misrepresentation, and Puffing

Agents may not use blind ads to attract buyers. A **blind ad** is one that fails to indicate that the advertiser is an agent and not a principal.

Inducing the purchase of a particular property by giving false comparables could subject an agent to damages for fraud. Agents have been known to show overpriced listings to make the property they hope to sell appear to be a bargain. Courts conceivably could treat this practice as a fraudulent representation of value.

Fraud is intentional deceit to induce a party to act to his detriment. Courts might award punitive as well as compensatory damages for an agent's fraud. In addition, fraud could result in criminal prosecution.

CASE STUDY In *U.S. v. Peterson* (2008) 538 F 3d 1064, it was shown that a developer falsified 43 gift letters showing gifts to homebuyers of the 3% down payment necessary to obtain FHA insurance. The down payments were actually advanced by the developer to allow no-down-payment loans. The defendants were found guilty of making false material statements to a federal agency. Defendants were sentenced to 18 months in prison, fined \$50,000, and ordered to pay restitution of over \$1 million for losses suffered by HUD because of foreclosures.

Note: Other developers have attempted to skirt the law by making gifts to charities that in turn would make gifts to the homebuyers.

An agent who showed a prospective buyer only a few units in an apartment complex probably would be implying that they were representative of all the units. If in fact the units shown were only the few updated units, the broker's action might be considered fraud, even though specific representations were not made.

Misrepresentation is the intentional or unintentional misstatement or concealment of a material fact. Misrepresentation could result in civil damages to compensate the injured party, as well as other contractual remedies.

The case of *Ford v. Cournale* (1974) 36 C.A.3d 172 held that providing income data based on 100% occupancy was misrepresentation for which the broker could be held liable.

There is some question about the broker's liability to a buyer when repeating false information provided by the owner. If the broker knew or should have known the information was false, the broker likely would be liable. It is not known if the *Easton* decision could be expanded to extend to a duty to check facts provided by an owner. As minimum protection, when supplying facts that have not been verified, a broker should indicate the source of the facts and that they have not been verified.

Puffing is a statement of opinion that involves information that a consumer would not rely upon and does not involve a material fact. A consumer would not rely upon the opinion that a listed house is the "best house on the street." This is an example of puffing and does not constitute a material fact, which is defined legally as one that would change the opinion or action of a person. On the other hand, a real estate licensee who overstates the square footage of a house would be making a misrepresentation of a material fact.

There can be a fine line between allowable puffing and misrepresentation or fraud. If an agent were to represent nearly worthless desert property as "a sound investment," a court could determine such a statement to be fraud or misrepresentation rather than mere puffing.

CASE STUDY The case of *Manderville v. PCG&S Group, Inc.* (2007) 146 C.A. 4th 1486 involved two couples who sought to buy property that could be split for two houses. The agent found an MLS property of 2.62 acres that stated, “1 acre min. lot size could be split.” Because a previous MLS listing for the property did not indicate it could be split, the selling agent contacted the listing agents who prepared the MLS language. It was confirmed by the listing agent that the property could be split. An offer was made on the CAR purchase form Vacant Land Purchase Agreement and Joint Escrow Instructions. The form stated that the buyers and the sellers were aware that the brokers did not guarantee “condition” of the property and gave the buyers 21 days to inspect the property. The buyers did not know that the county general plan designator “4” required a 4-acre minimum lot size for splitting. The superior court granted summary judgment for the brokers, ruling that the exculpatory language in the purchase contract absolved the brokers from liability.

The Court of Appeal reversed, ruling that neither the exculpatory language of the purchase contract nor the buyers’ failure to investigate the zoning as to lot splitting bars their action for the listing brokers’ intentional misrepresentation (Civil Code Section 1668 bars exculpatory clauses from exempting anyone from the fraud).

Referral Fees

When people are moving from the area, brokers often will recommend that they see a particular broker in the new area. The prospective buyers reasonably could believe that the broker is acting as a gratuitous agent in recommending someone who can best meet their needs. This often is not the case; the broker may in fact be recommending that the buyers see a particular broker because that broker will give the agent part of any commission upon any resulting sale. A case could be made that this fee is a secret profit being made by the presumed gratuitous agent of the buyers. If the courts agreed to this supposition, the buyers would be entitled to the secret profit paid to the agent. Brokers could protect themselves by making full disclosure of any financial arrangements they have with the recommended firm.

DUTIES TO OTHER BROKERS

A broker has no legal duty to cooperate with other brokers; however, brokers customarily cooperate with one another because doing so is in their best interests. The various associations serving the real estate business have codes of ethics and rules that help set standards for professional conduct. These are not laws, though statutes cover some of the same areas. The penalties for breaching these rules generally are fines or expulsion from the organization. If the exclusion of a broker from an organization would have a detrimental economic effect on that broker’s business, then exclusion can be effected only for good cause.

WEB LINK



The largest association of brokers is the National Association of REALTORS® (NAR). The state organization of NAR (www.realtor.org) is the California Association of REALTORS® (CAR) (www.car.org). The word **REALTOR®** is a trademark word, and it is a violation of the law for a person who is not a member of the NAR to use the REALTOR® designation. The same is true for **Realist**, which denotes a member of the National Association of Real Estate Brokers. (www.nareb.com)

The National Association of REALTORS® encourages arbitration of broker disputes, but brokers can sue one another in court.

To work with **subagents**, the broker must have the specific approval of the principal. If the listing authorizes subbrokers (subagents), an agency is created between the seller and the subbroker. The seller is liable to third persons for the subbroker's actions, and the subbroker has a fiduciary responsibility to the owner.

If an agent appoints a subbroker without authority to do so, the subbroker is the agent of the listing broker and not of the principal. Because subagency makes the selling broker the agent of the seller, it provides no protection for the buyer.

Because subagency can expose principals, as well as listing brokers, to liability for acts of another, subagency provisions have been removed from many listing agreements. Most cooperating brokers act as buyer agents.

A broker could be held liable to another broker if the first broker indicated that she had an exclusive right-to-sell listing and the other broker obtained a buyer only to find there was no listing.

Multiple listing services may not exclude listings that are not exclusive right-to-sell listings. Such action would be an unreasonable restraint of trade, as would agreements setting minimum commissions among brokers.

Brokers have been known to tell owners that it is in their best interests to prohibit them from cooperating with other brokers. If the reason is that the property is highly saleable and the broker wants to avoid splitting a commission, then this prohibition would be self-serving. If it could be shown that the prohibition worked to the financial detriment of the owner because of offers that would otherwise have been received, the broker could be liable for damages.

The case of *Marin County Board v. Polsson* (1976) 16 C.3d 920 held that refusal to allow a broker to join the multiple listing service is an antitrust violation. (The court also ruled that an MLS member need not be a member of the local REALTOR® organization.)

WEB LINK



Sherman Antitrust Act of 1890

The **Sherman Antitrust Act** was enacted to prevent businesses from conspiring to control prices and/or competition. Penalties for violations include criminal penalties up to \$100 million for corporations and \$1 million for individuals. The act is enforced by the Federal Trade Commission (www.ftc.gov).

Antitrust violations include the following four:

1. **Price-fixing.** It would be illegal for a group of brokers to agree on minimum commissions that they would charge.
2. **Market allocation.** Agreements of firms to divide a marketplace geographically or by type of service would be a violation because it would tend to reduce or eliminate competition.
3. **Group boycotting.** Firms may not agree to refuse to do business with a firm or an individual. As an example, it would be a violation of the act for two or more firms to agree not to allow another firm to show their listings.
4. **Tie-in agreements.** Agreements that require a business to buy additional goods or services in order to get the goods or services desired would be illegal. An example of a tie-in agreement would be the requirement that the buyer agree to keep the property insured through a firm controlled by the broker as a condition of submitting the buyer's offer.

The **Cartwright Act** (Business & Professions Code 16720) is California's antitrust act that prohibits agreements restraining trade. A federal violation is likely to also violate the state law, which provides for penalties for individuals up to \$250,000 and imprisonment up to three years.

FEES TO NONLICENSEES

Although finder's fees payments by real estate licensees are not allowed in some states, a California real estate licensee can pay a referral or **finder's fee** to a nonlicensee for an introduction. However, the introduction must be the extent of the finder's involvement; the nonlicensee cannot quote prices, show property, negotiate the transaction, or perform any duty for which a license is required. A broker may not compensate an unlicensed finder who performs any act for which a license is required (Business and Professions Code Section 10137).

CASE STUDY Tenzer, a director of Superscope, was asked to find a buyer for property owned by the corporation. The president orally agreed to a 10% finder's fee, and Tenzer produced a buyer who purchased the property for \$16 million. The corporation refused to pay Tenzer a finder's fee. After a summary judgment in favor of Superscope, the case was appealed to the California Supreme Court.

The court held that a finder without a written agreement may recover if the principal is estopped from pleading the statute of frauds.

The court held that if Tenzer was not otherwise obligated to reveal the names of the prospective purchaser and did so upon the verbal promise of a finder's fee, then Superscope would be estopped from raising the defense of the statute of frauds. While licensed brokers cannot get around the statute of frauds by claiming estoppel, Tenzer was not licensed. The supreme court indicated that the trial court should determine if Tenzer was a mere finder or participated in sale negotiations. If he participated, he would have had to be licensed to collect a fee. The court also indicated that Tenzer could recover based on fraud if Superscope's president never intended to pay him.

Because the plaintiff's claim was based on equity, the court held that the plaintiff must show that the agreement was fair (*Tenzer v. Superscope, Inc.* (1985) 39 C.3d 18).

DUTY OF BUYERS

While sellers have a duty of disclosure, buyers have no corresponding duty to disclose material facts that they are aware of, such as why they are buying.

CASE STUDY The case of *Nussbaum v. Weeks* (1989) 214 C.A.3d 1589 involved a purchase of the plaintiff's land by the general manager of the water district. The sellers sued the buyer for failure to disclose the probability that the water district would increase the availability of water to the land purchased. The Court of Appeal, in reversing a superior court decision, held that a property buyer has no duty to disclose material facts to a seller, and that the buyer had no special duty as general manager of the water district to explain that the board of directors might vote to increase water supplies.

SUMMARY

In Unit 2, you learned about agency rights and duties. This unit expands the framework established by Unit 2.

While our laws set the minimum standard of acceptable conduct, ethics go beyond the law to what *should* be. Understanding ethics is important to the real estate licensee because ethics precede the law. What apparently was legal, but unethical at the time of an action, might later be determined to have been illegal by our courts. Licensees who use the law alone as a standard of conduct could find themselves facing great liability.

Employment contracts between brokers and salespeople usually specify that the salesperson is an independent contractor. The reason for this type of contract is to avoid withholding tax and Social Security contributions by the broker. (The IRS will consider real estate salespeople to be independent contractors if minimum conditions are met.) A salesperson can self-designate as an independent contractor. The broker is liable for the wrongful acts of the salesperson within the scope of employment.

The agent's primary duty is to the principal. The agent's conduct must be governed by what is in the best interests of the principal. The agent not only must be honest with the principal but also must protect the principal from the dishonest conduct of others. The agent also must be particularly careful to protect the principal's interests when the agent has an interest as well, such as in the case of a net listing, an option listing, or when the agent is also a buyer.

The agent's duty to buyers is much more than simply revealing anything detrimental about a property that the agent is aware of. The agent has an affirmative duty to conduct a reasonably competent and diligent inspection of residential property and to disclose to prospective purchasers all facts materially affecting the value of the property that such an investigation reveals. The seller of one to four residential units also has a duty to disclose known defects to a buyer. Both the seller and the broker must execute the Real Estate Transfer Disclosure Statement.

Neither the principal nor the agent can avoid liability by selling property "as is." "As is" applies only to obvious defects and offers no protection to agents and/or owners from hidden defects that they knew of but failed to disclose.

Although brokers have no legal duty to cooperate with other brokers, they should be aware of the liabilities and responsibilities imposed by subagency.

The Sherman Antitrust Act makes it illegal for businesses to conspire to control prices or competition through price-fixing, market allocation agreements, group boycotting, or tie-in agreements.

Buyers do not have the duty to disclose to sellers material facts that they are aware of.

DISCUSSION CASES

1. The sellers' broker obtained one termite report that indicated \$971 worth of work was required. A second report indicating termite infestation, dry rot, and fungus estimated correction costs of \$1,155. The broker did not disclose the second report to the buyers but provided for paying the buyers the cost of doing the work discovered on the first report. The buyers discovered the extensive dry rot and termite infestation when they moved in. **What is the liability of the broker?**

Godfrey v. Steinpress (1982) 128 C.A.3d 154

2. Marcos, a minor, moved into the house his mother purchased. After occupancy, an environmental test showed a dangerous level of mold spores. Marcos became ill and sued the real estate agents, alleging breach of statutory duties. **Assuming there was negligence on the part of the agent, should Marcos be entitled to damages?**

Coldwell Banker Residential Brokerage Co. Inc. v. Superior Court (2004) 117 C.A.4th 158

3. A multiple listing service refused to accept any listings but exclusive right-to-sell listings. **Was the action of the multiple listing service proper?**

People v. National Association of REALTORS (1981) 120 C.A.3d 459

4. The defendant, a real estate salesman, failed to recommend a title search when the plaintiffs leased a chicken ranch with an option to purchase. The defendant, without actual knowledge, claimed that one trust deed against the property existed and that the payments included interest. In fact, there was a second trust deed and the payments on the first trust deed did not include the interest. The plaintiffs indicated that had they known of the condition of the title, they would not have entered into the lease agreement. **What problems does this case present?**

Wilson v. Hisey (1957) 147 C.A.2d 433

5. A broker fraudulently represented to the purchaser that he was the agent of a property owner. He quoted a price of \$1,000 more per acre than was being asked for a 72-acre-plus parcel. The broker presented his own offer of \$4,000 per acre to the owner after he had induced the purchaser to make an offer of \$5,000 per acre. **What is the broker's liability, and to whom, if anyone, would he be liable?**

Ward v. Taggart (1959) 51 C.2d 736

6. Sutherland transferred and sold his house to a relocation company. In the Transfer Disclosure Statement, he answered "No" as to any neighborhood noise problems or other nuisances. Shapiro purchased the home and immediately discovered loud disturbances from the family next door (arguments and late-night music). Shapiro learned that the Sutherlands had called the police a number of times about the arguments and late-night music. Shapiro asked for a rescission of the sale. The Sutherlands said that they had no contractual relationship with Shapiro. **Are the Sutherlands liable to Shapiro?**

Shapiro v. Sutherland (1998) 60 C.A.4th 666

7. A broker who was not an attorney advised a married couple about the kind of document they should execute to secure a loan. **Was the broker's advice proper?**

People v. Sipper (1943) 61 C.A.2d 844

8. While viewing a property, a prospective tenant thought she was entering a closet and fell down basement stairs behind an inward-swinging door. The stairs had no landing or hand-rail. **What is the liability of the agent?**

Merrill v. Buck (1962) 58 C.2d 552

9. While the plaintiff did not read the written agreement, the plaintiff asked the loan broker about the loan terms and received misleading and incomplete information. Late charges also were made that could not be justified. **What duties, if any, has the loan broker breached?**

Wyatt v. Union Mortgage Company (1979) 24 C.3d 773

10. A private individual brought suit against a board of REALTORS® because he was denied access to its multiple listing service. He claimed that refusing him the ability to list his house with the service forced him to deal through a broker, which violated the antitrust laws. **Was his complaint valid?**

Derish v. San Mateo-Burlingame Board (1982) 136 C.A.3d 534

11. Carter, a broker, sold a net listing to his daughter and received a \$5,000 commission. The seller had agreed to the list price based on the broker's recommendations. **What are the problems involved in this case?**

Sierra Pacific Industries v. Carter (1980) 104 C.A.3d 579

12. A multiple listing service provided that disputes among members over commissions be submitted to an arbitration procedure and that members who refused to arbitrate could be expelled. Bernstein refused to arbitrate and was expelled from the service. **Was expulsion proper?**

United Multiple Listing Service v. Bernstein (1982) 134 C.A.3d 486

13. A broker purchased a house listed by another broker. The purchasing broker indicated that he was a broker and would share in the commission. He also indicated that he was purchasing the house as his residence. The broker opened a second escrow because he had a purchaser for the house. **Did the purchasing broker do anything wrong?**

Gray v. Fox (1984) 151 C.A.3d 482

14. Traweck Investment Company promoted and managed a limited partnership. Three months after buying a building for \$4 million (including 6% commission to Traweck), the company placed the building on the market for \$5.7 million. Ballou, a broker, produced an offer for \$5.4 million. While Ballou had been promised a 6% commission, Traweck indicated that Ballou would have to agree to a \$100,000 commission, claiming that was all that could be paid because the general partners had guaranteed returns that had to be met. Later Ballou agreed to a further reduction to \$50,000 based on Traweck's assertion that no other commissions were being paid. Ballou later discovered Traweck received \$222,000 in commission for the sale. **What are Ballou's rights?**

Ballou v. Masters Props. No. 6 (1987) 189 C.A.3d 65

15. A neighbor operated a tree-trimming business from his home, engaged in noisy activities, poured motor oil on his roof, and had a cabana not in conformance with the subdivision restrictions. Five families sued to abate alleged nuisances. **Does a seller have a duty to disclose these facts to a buyer?**

Alexander v. McKnight (1992) 7 C.A.4th 973

16. A buyer received a seller-disclosure that a house was in a floodplain. It did not disclose that a city ordinance prohibited enlarging such homes or rebuilding them if they were destroyed. **Was the disclosure adequate?**

Sweat v. Hollister (1995) 37 C.A.4th 603

17. A broker suggested to a seller that a lead-paint test be made because the home was built in 1860. The test was positive. While the seller completed the lead-paint disclosure form that referenced the report, the report was not given to the buyer. The broker, acting as a dual agent, orally advised the buyers of the lead paint and the existence of the report, but the broker was not able to get the report from the sellers. However, it was provided at closing.

A written disclosure of known lead-based paint is required by the Residential Lead-Based Paint Hazards Reduction Act of 1992 and must be signed by the buyer. The act calls for treble damages when a person "knowingly" violates the statute. **Was the broker's oral disclosure adequate?**

Smith v. Coldwell Banker Real Estate Services (2000) 122 F. Supp. 2d 267

18. Cal Fed acquired a condominium unit through its nonjudicial trustee's foreclosure sale. Assilzadeh, a tenant in another unit, made a purchase offer through Fred Sands Realty, who disclosed it was acting as a dual agent. The seller's counteroffer stated, "Buyer to be aware that property was acquired through foreclosure and Seller is exempt from providing a property disclosure statement. No warranties expressed or implied are included in this sale. Subject property is being sold in its present 'as is' condition. Buyer will satisfy himself or herself as to the condition of said property, and their requirement regarding permitted and nonpermitted areas of the subject property." During escrow, Assilzadeh signed an amendment to the purchase contract that said, "Buyer hereby acknowledges that there has been no representation by the Seller regarding the condition of the property. Buyer is hereby granted the right to inspect the Property or to obtain inspection reports from qualified experts at his own expense... If such reports reveal any latent defects which are unacceptable to Buyer... neither Buyer nor Seller shall have any further liability to the other." The dual agent verbally informed Assilzadeh of the homeowners association lawsuit against the developer and its recent settlement for \$5.1 million.

Assilzadeh inspected the condo with her son, Amin. She also hired a professional inspector. After escrow closed, Assilzadeh bought marble flooring. But the homeowners association said she could not install it because of structural defects affecting the load capabilities of the highrise building. She sued Cal Fed, Fred Sands Realty, and the sales agent for rescission and restitution, as well as fraudulent concealment, negligence, and breach of fiduciary duty against Fred Sands Realty and the agent. **Were adequate disclosures made by the agent?**

Assilzadeh v. California Federal Bank (2000) 82 C.A.4th 399

19. **Does a real estate broker have a duty to disclose to a buyer that it is a short sale?**

Holmes v. Summer (2010) 188 C.A.4th 1510

20. **Does a party who claims to have a prescription easement have a duty to inform a prospective buyer of the interest claimed?**

Hoffman v. 162 North Wolfe, LLC (2014) 228 C.A.4th 1178

UNIT QUIZ

1. Ethics is *BEST* described as
 - a. obeying the law.
 - b. doing what is right.
 - c. an agency duty.
 - d. treating all people the same.
2. In selling listings of another broker, a real estate salesperson is directly responsible to
 - a. his broker.
 - b. the owner.
 - c. the listing broker.
 - d. the multiple listing service.
3. Which statement is *NOT* an IRS requirement for a real estate salesperson to be treated as an independent contractor so that the employing broker can avoid withholding taxes and Social Security contributions?
 - a. That the salesperson have a valid California real estate license
 - b. That reimbursement be based solely on sales and not on hours worked
 - c. That there be a written contract that the salesperson will be treated as an independent contractor for tax purposes
 - d. That the salesperson work without supervision
4. A broker would *MOST* likely be responsible to salespeople for
 - a. unemployment compensation.
 - b. minimum wages.
 - c. workers' compensation.
 - d. all of these.
5. Commission disputes between a broker and salespeople would likely be referred to the
 - a. state labor commissioner.
 - b. Court of Appeal.
 - c. agency review board.
 - d. real estate commissioner.
6. A nonlicensee may properly be paid a finder's fee if she
 - a. participated in negotiations.
 - b. introduced the parties to the licensee.
 - c. obtained the offer to purchase.
 - d. had a signed agreement to act as an agent of a broker.

7. In presenting to an owner two identical offers requiring seller financing, which act of the broker would be wrong?
 - a. Mentioning that one buyer had only recently been hired after a long period of unemployment
 - b. Mentioning that one buyer was black
 - c. Mentioning that one buyer had substantially greater income
 - d. Mentioning that one buyer had not given truthful credit information
8. A prospective buyer knows that the owner is considering accepting an offer from another party. He asks you, the listing broker, the amount of the offer so that he can exceed it. You should
 - a. tell him, because it is in the owner's best interests.
 - b. tell him, because you must reveal all known facts to a buyer.
 - c. notify the owner of the request.
 - d. refuse to tell him or to accept any offer unless the present offer is rejected.
9. A seller's broker may *NOT* inform a prospective purchaser that
 - a. the owner will accept less than the list price.
 - b. the present use of the structure does not conform to zoning.
 - c. there are material defects in the improvements.
 - d. the building is on filled land.
10. An agent need not disclose to an owner that he has received an offer when
 - a. the owner has already accepted another offer.
 - b. the offer is verbal.
 - c. escrow has already closed.
 - d. the offer is less than the listing price.
11. Which statement is *TRUE* regarding net listings?
 - a. They are illegal in California.
 - b. The broker must disclose the amount of commission to be received.
 - c. The broker's best interests would be served by setting as high a net price as possible.
 - d. None of these is true.
12. Which statement is *FALSE* regarding option listings?
 - a. If a property fails to sell, the broker must exercise the purchase option.
 - b. Before exercising the option, the broker must reveal all offers received.
 - c. The broker must reveal the amount of profit, if any, to the owner to exercise the option.
 - d. The owner must consent in writing to the agent's profit should the option be exercised.

13. A broker sold an apartment building to a syndicate of which the broker was a member without informing the seller of this interest. Before closing, the owner discovers the broker's interest and refuses to sell. Which of the following choices would probably result from a suit to collect a commission?
 - a. The broker's license would be revoked.
 - b. The broker would get the commission.
 - c. No commission would be paid.
 - d. The buyer would obtain specific performance.
14. During the term of an escrow, a listing broker discovered that an addition to the building had been made without a building permit and that the addition was in violation of the building code. The broker should notify
 - a. the buyer only.
 - b. the seller only.
 - c. both the buyer and the seller.
 - d. neither, because the broker obtained this knowledge after the contract was entered into.
15. Two brokers agreed that they would not allow a third broker to show their listings. This would be
 - a. price-fixing.
 - b. a tie-in agreement.
 - c. a Sherman Act violation.
 - d. market allocation.
16. Which statement is *TRUE* about required disclosures to residential buyers?
 - a. There is a two-year statute of limitations on disclosure.
 - b. The buyer also has a duty to exercise reasonable care.
 - c. The duty of inspection is limited to one to four residential units.
 - d. All of these statements are true.
17. The *Easton* decision about required disclosures does *NOT* apply to
 - a. single-family residences.
 - b. defects that would be discovered by a reasonably competent inspection.
 - c. nonresidential property.
 - d. patent defects.
18. An agent would *MOST* likely have to inform a prospective purchaser about the
 - a. persistent mold problem.
 - b. race of the previous occupants.
 - c. owner having AIDS.
 - d. mysterious deaths of last two owners.

19. Which is an example of blind advertising?
 - a. Failure to advertise a location
 - b. Failure to indicate that the advertiser is an agent
 - c. Failure to include the name of the agent
 - d. Failure to include the price
20. In selling a commercial property, an agent's duty to the buyer includes
 - a. informing the buyer of prior rejected offers.
 - b. informing the buyer that the zoning is not appropriate for the intended use.
 - c. telling the buyer the reason the seller is selling.
 - d. all of these.
21. A broker told prospective purchasers, "You will love living in this neighborhood." After experiencing problems with their new neighbors, they sued the broker for this false statement. A court would likely determine the statement was
 - a. criminal fraud.
 - b. misrepresentation.
 - c. puffing.
 - d. none of these.
22. A listing broker is *NOT* ordinarily responsible for wrongful acts committed in the course of a sale by
 - a. his employees.
 - b. his salespeople having independent contractor contracts.
 - c. a buyer's agent.
 - d. none of these.
23. An agent may pay a fee to an unlicensed party who
 - a. shows property.
 - b. negotiates sale or lease terms.
 - c. takes a deposit from a buyer.
 - d. introduces the buyer to the broker.
24. Which statement is *TRUE* of the buyer's duties?
 - a. Buyers have the same disclosure duties as sellers.
 - b. Buyers are required to complete a disclosure statement only for residential purchases.
 - c. Buyers are subject to *Easton* liability for nondisclosure.
 - d. Buyers have no duty to disclose material facts to the seller.

25. Buyers must disclose to sellers
- a. any information they have of which the seller is unaware.
 - b. the purpose of their purchase.
 - c. other purchases they have made.
 - d. none of these.

4

UNIT FOUR



REGULATIONS OF LICENSEES

KEY TERMS

Administrative Procedures Act	Fair Housing Amendments Act of 1988	Omnibus Housing Nondiscrimination Act
advance fee	familial status	Real Estate Advisory Commission
Americans with Disabilities Act	Federal Personal Responsibility and Work Opportunity Act	redlining
Article 5	first point of contact	restricted license
Article 7	Franchise Investment Law	Rumford Act
associate broker	MOG brokers	SAFE Act
blockbusting	Mortgage Loan Disclosure Statement	send-out slip
Bulk Sales Act	mortgage loan originator (MLO)	sexual harassment
California Fair Employment and Housing Act	Nationwide Mortgage Licensing System and Registry (NMLS)	steering
Civil Rights Act of 1866		successor liability
Civil Rights Act of 1968		table funding
equal housing opportunity poster		Unruh Civil Rights Act
		usury

THE CALIFORNIA DEPARTMENT OF REAL ESTATE

The purpose of the real estate law is to ensure, as far as possible, that real estate brokers and salespeople will be honest, truthful, and of good reputation. *Brown v. Gordon* (1966) 240 C.A.2d 659.

WEB LINK



The real estate commissioner is the chief executive of the California Department of Real Estate (DRE), www.dre.ca.gov. The primary responsibility of the real estate commissioner, who is appointed by the governor, is to enforce the real estate law in such a manner that purchasers of real estate and those people dealing with real estate licensees are afforded maximum protection.

The commissioner has full authority to control the issuance, suspension, and revocation of real estate licenses. The commissioner also has the authority to adopt or repeal rules and regulations as necessary to enforce the real estate law. As mentioned in Unit 1, these rules and regulations have the force and effect of law.

The real estate commissioner may bring an action in the name of the people of California in the superior court against people the commissioner believes to be in violation of the real estate law. (The California attorney general is the legal adviser to the real estate commissioner.) In that action, the commissioner may ask the court to enjoin any further violations of the law. The commissioner may include in any action a claim for restitution in the names of people injured (Business and Professions Code Section 10081). Any criminal action against a licensee for a wrongful act is brought by the district attorney in the county where the offense took place, not by the commissioner.

If the commissioner believes, from satisfactory evidence, that trust funds are not being accounted for properly or are in danger, the commissioner may ask the superior court for an injunction. If the commissioner has conducted an audit that indicates a conversion of funds in excess of \$10,000, the court may order the broker to refrain from further exercising the privileges of her real estate license. After a hearing, the court may appoint a receiver.

Before revoking, suspending, or denying any real estate license, the commissioner must hold a hearing (see Figure 4.1 for hearing procedures) in accordance with the **Administrative Procedure Act**.

FIGURE 4.1: License Discipline Hearing Procedures

The following is reprinted from the California DRE *Real Estate Bulletin*, Summer 1990:

Disciplinary hearings are conducted under the Administrative Procedure Act (Government Code Sections 11500-11528) and are presided over by an administrative law judge who is employed by a state agency independent of the Department of Real Estate. The hearings are conducted in a manner similar to court trials without a jury. At the hearing, the department has the burden of proving the charges contained in the accusation and usually does so by calling witnesses and presenting documents in evidence. The department is represented by its own attorneys at the hearing, and the respondent may be represented by his or her attorney or may proceed without an attorney. There is no provision of law which allows the respondent to be represented by an attorney at state expense similar to the public defender in criminal cases. The respondent has the right to object to evidence offered by the department and to cross-examine witnesses called by the department. The respondent also has the right to present evidence and to call witnesses to testify on his or her behalf.

The document which initiates the process to determine whether a licensee should be formally disciplined is known as an accusation. The accusation sets forth in ordinary and concise language the acts or omissions with which the licensee (referred to as the respondent) is charged. After the accusation has been filed as a formal document with the department, it must be served on the respondent. Service is affected by personal delivery or by certified mail to the respondent's last known business, residence or mailing address on file with the department. After being served, the respondent has 15 days to file a notice of defense with the department. The notice of defense serves two functions: first, as a formal denial of the charges in the accusation and secondly, as a request for a hearing. A failure to file a notice of defense allows the department to proceed to disciplinary action (usually a license revocation) without hearing.

After a notice of defense is filed, the department asks the Office of Administrative Hearings to schedule a hearing. Depending on the length of time required, the hearing will generally be held from two months to 12 months from the date the notice of defense is filed. The respondent has the right under the discovery provisions of the law to examine evidence in the department's investigative file and to be told the names and addresses of witnesses who may be called.

After the hearing is concluded, the administrative law judge prepares a proposed decision which is sent to the real estate commissioner. The commissioner has three options: adopt the proposed decision as his/her own, reduce the penalty or reject the decision. If rejected, the commissioner must obtain a complete transcript and record of the hearing and issue a decision based on review of the transcript and exhibits.

If an adverse decision is issued by the commissioner, the respondent may petition the commissioner for reconsideration or may seek judicial review of the decision in Superior Court. After the decision becomes final, the respondent may petition the commissioner for reinstatement of a license one year after the effective date of the decision. This brief overview of the process is provided to give you a greater understanding of what takes place in license disciplinary actions. As you can see, the law provides a number of rights to a respondent in a disciplinary action to ensure that a fair hearing has been held.

Those interested in learning more about Administrative Procedure Act hearings should refer to Section 11500 et seq. of the Government Code.

ACTIVITIES REQUIRING A LICENSE

A real estate broker is a person who, for compensation or the expectation of compensation, does one or more of the following acts for others:

- Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property or a business opportunity (Business and Professions Code 10131(a))
- Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase, or exchange of leases on real property or on a business opportunity, or collects rents from real property or improvements thereon or from business opportunities (Business and Professions Code Section 10131(b))
- Assists or offers to assist in filing an application for the purchase or lease of or in locating or entering upon lands owned by the state or federal government (Business and Professions Code Section 10131(c))
- Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity (Business and Professions Code Section 10131(d))
- Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity and performs services for the holders thereof (Business and Professions Code Section 10131(e))
- Collects an **advance fee** in connection with promoting the sale, lease, or exchange of real property or of a business opportunity or to arrange a loan thereon (Business and Professions Code Section 10131.2)
- Issues, sells, exchanges, negotiates, or solicits sellers or purchasers of securities specified in Section 25206 of the Corporations Code (shares in real estate syndicates). These syndicate interests also may be sold by broker/dealers licensed by the commissioner of corporations. (Business and Professions Code Section 10131.3)
- Buys and sells or offers to buy and sell, negotiate for, or solicit purchasers or sellers of mobile homes. Dealers licensed by the Department of Housing and Community Development are also authorized to sell mobile homes. (Business and Professions Code Section 10131.6)

WHEN LICENSING IS NOT REQUIRED

Exempt from real estate licensure are

- those dealing in their own property as principals, except those buying, selling, or exchanging eight or more notes per year secured by deeds of trust or sales contracts;
- officers dealing for a corporation in corporation property for which they receive no special compensation;
- those dealing under an executed power of attorney;
- attorneys-at-law rendering services while acting as attorneys-at-law;
- those operating under court order (receivers, trustees in bankruptcy, executors of estates, etc.);
- trustees selling under a power of sale in a trust deed;
- banks, trust companies, savings associations, industrial loan companies, pension trusts, credit unions, insurance companies, or their employees;
- auctioneers who merely “cry” an auction need not be licensed, but soliciting buyers and sellers for a real estate auction or presenting documents to be signed after the auction requires a license;
- lenders making loans insured by an agency of the federal government or for which such a commitment has been made;
- nonprofit agricultural cooperatives engaged in lending and marketing;
- people licensed as personal property brokers, consumer finance lenders, or commercial finance lenders, while acting in that capacity;
- cemetery authorities and their agents;
- those who make real estate loan collections for the owners, provided they collect \$40,000 or less from 10 or fewer loans in one year or they are corporations licensed as escrows;
- unlicensed assistants who do not show property, solicit business, or negotiate or encourage a purchase or utilization of a broker;
- stenographers, bookkeepers, receptionists, and other clerical help carrying out normal clerical duties;
- resident managers of apartment complexes (Business and Professions Code Section 10131.01 has expanded the resident manager exception to include employees of a property management firm retained to manage a residential apartment building—potentially including nonresident employees—working under the supervision of a licensed broker or salesperson. Also exempt are people renting transient accommodations.);
- condominium association managers who do not rent or sell units;
- homeowners association managers.
- finders who receive a fee for introducing the parties.

CASE STUDY A power of attorney cannot be used to circumvent licensing requirements. In *Sheetz v. Edmonds* (1988) 201 C.A.3d 1432, the Court of Appeal upheld the real estate commissioner's order to Sheetz to stop managing 23 properties. Sheetz, who was not licensed as a broker, performed management services for compensation and claimed to be exempt from Business and Professions Code Section 10133 because she held a power of attorney from the owner. The exemption was judged to apply only to a particular or isolated transaction and cannot be used as a substitute for a broker's license. The court considered the fact that the owner was a close friend of Sheetz's to be irrelevant

LICENSE REQUIREMENTS

WEB LINK



Applicable sections of the California Business and Professions Code as well as regulations of the real estate commissioner dealing with licensing requirements can be found in the *Real Estate Law* volume published by the California Department of Real Estate. (The book may be accessed free of charge at www.dre.ca.gov.)

Salesperson's License

To qualify for a salesperson's license, the applicant must

- be at least 18 years of age;
- take and pass the real estate examination for salespeople;
- be fingerprinted;
- have an employing broker at the time the license is issued (broker affiliation is not required to sit for the examination);
- apply for a license within one year after passing the salesperson's examination;
- have completed three college-level courses including real estate principles, real estate practice, and a third course from an approved list (members of the State Bar of California are exempt from course requirements);
- be honest and truthful (conviction of a felony or crime involving moral turpitude may result in denial of license); and
- pay the applicable fee.

Under State Bill 1159, effective January 1, 2016, proof of legal presence is no longer required for

- applicants for a license,
- license renewal applicants, and
- applicants for payment from the Real Estate Recovery Fund.

This means that, except as specified, any entity within the department may not deny licensure to an applicant based on citizenship status or immigration status.

Broker's License

An applicant for a broker's license must

- be at least 18 years of age;
- have two years' experience or the equivalent as a real estate salesperson within the prior five-year period or a valid four-year college degree with a major or minor in real estate;
- have successfully completed eight college-level courses including real estate practice, legal aspects of real estate, real estate finance, real estate appraisal, and accounting or real estate economics (plus three additional courses from an approved list);
- pass the broker's examination;
- be fingerprinted;
- be honest and truthful (conviction of a felony or a crime involving moral turpitude may result in denial of license);
- pay the applicable fee; and
- (for a California applicant) maintain an office location within California (can be a home office).

The Department of Real Estate may not use an expunged criminal conviction or one more than seven years old as the basis to deny the real estate license (applies to broker and salesperson licenses).

Associate Broker

A person with a broker's license can work as a salesperson for another broker. This associate broker is treated as a salesperson. The **associate broker** may work for more than one broker but has the same responsibilities of any other salesperson.

Partnership Licenses

While there is no specific partnership license, a broker can be a partner with a salesperson in a real estate brokerage business. However, every partner through whom the partnership acts must be a licensed real estate broker. A broker may be a partner with a nonlicensee in business activities where real estate licenses are not required.

Corporation Licenses

A real estate sales corporation must have one real estate broker who has a corporation officer license. The broker also can have a separate individual license.

A salesperson can be an officer and a stockholder of a corporation. The salesperson can be a majority stockholder only if the responsible corporate broker is also an officer and director of the corporation.

Nonresident Licensees

Legal service to institute a lawsuit may be made on the secretary of state if by using reasonable diligence; process cannot be personally served on the licensee in California.

WEB LINK



Nonresident brokers doing business in California must maintain a California business address. Nonresident real estate salespeople engaging in business in California must be licensed with a California broker. For more information, consult the DRE website: www.dre.ca.gov/examinees/outofstate.html.

First Point of Contact Disclosures

First point of contact solicitation material includes business and stationary flyers; advertising in print and electronic media; brochures, leaflets, mail (including email); and for sale, for rent, for lease, and open house and directional signs.

Solicitation material must include the name of the licensee and the broker and the eight-digit license number of each licensee in the advertisement. If a team name is used, the salesperson(s) and broker's names must be included.

Team Advertising

A real estate team is a group of agents working for the same broker who decide to pool their efforts and work together for greater efficiency and rewards.

Under real estate law, a team name is not regarded as a fictitious name, so no paperwork is required. The team name must include the last name of at least one of the sales agents in addition to the word *associates*, *group*, or *team*. The name cannot use the words *broker*, *brokerage*, or other terms indicating independence from their responsible broker.

On any advertising material, the employing broker's name must be displayed just as prominently as the team's name.

LICENSE RENEWALS

First Time License Renewals

Licensees renewing for the first time must complete 45 hours of continuing education as follows:

- Five separate 3-hour courses in the following subjects: ethics, agency, trust fund handling, fair housing, and risk management
- A minimum of 18 hours of consumer protection courses
- Courses related to either consumer service or consumer protection to fill out the remaining clock hours

Broker Renewal

A broker license renewal requires the completion of 45 hours of continuing education as follows:

- Six separate 3-hour courses in the following subjects: ethics, agency, trust fund handling, fair housing, risk management, management and supervision
- A minimum of 18 hours of consumer protection courses
- Courses related to either consumer service or consumer protection to fill out the remaining clock hours

Salesperson and Broker Second and Subsequent Renewals

All real estate brokers and salespeople must complete 45 clock hours of DRE continuing education consisting of

- one 8-hour survey course covering the six mandatory subjects (ethics, agency, fair housing, trust fund handling, risk management and management and supervision) or the licensee can choose to take each of the mandatory subjects separately; and
- a minimum of 18 clock hours of consumer protection; and
- either consumer service or consumer protection courses to fill out the remaining clock hours.

The DRE can withhold issuance or renewal of a real estate license of a party who has been placed on a certified list of people who are delinquent in child or family support payments. The DRE can issue a temporary license for a period of 150 days during which period the licensee must comply with required payments.

Under the 70/30 rule, licensees who are at least 70 years of age and have been licensed in good standing in California for 30 continuous years are exempt from continuing education requirements for license renewal.

Late Renewals

For late license renewals, there is a two-year grace period. The licensee cannot act as a real estate agent while the license is expired.

GROUNDINGS FOR DISCIPLINARY ACTION

All real estate licensees are subject to disciplinary proceedings by the real estate commissioner for

- making a substantial misrepresentation;
- making a false promise likely to influence, persuade, or induce;
- engaging in a continued and flagrant course of misrepresentation or making false promises;

- acting for more than one party to a transaction without the knowledge and written consent of all the parties (undisclosed dual agency);
- commingling with his or her own money or property the money or property of others entrusted to the agent's care;
- claiming or receiving a fee for any exclusive listing that does not include a definite termination date;
- making a secret profit;
- exercising an option coupled with a listing where the licensee failed to reveal the amount of profit and obtain the consent of the owner for the amount of profit;
- engaging in any conduct that constitutes fraud or dishonest dealing;
- obtaining the agreement of a prospective purchaser that the purchaser will deal only through the agent with regard to a particular property (**send-out slip**) without the written authorization of the owner (must have written authorization to sell from the business owner before having the purchaser agree to pay compensation if the purchase is completed);
- procuring or attempting to procure a real estate license by fraud, misrepresentation, or deceit, or by a material misstatement of fact in an application for a license, license renewal, or license reinstatement (within 90 days after issuance, the commissioner can suspend a license so obtained, without a hearing);
- entering a plea of guilty or nolo contendere to, or being found guilty of, a felony or a misdemeanor where the crime bares a substantial relationship to the duties of a real estate licensee and the time for appeal has expired;
- knowingly aiding in the publication or circulation of a materially false statement concerning the licensee's business or any business opportunity, land, or subdivision;
- willfully disregarding any provision of the real estate law;
- making any false statement concerning their business or designation, certificate, special education, or trade organization membership, including using the terms *REALTOR*, *Realtist*, or any trade name or insignia when not entitled to such use;
- improperly influencing or attempting to improperly influence an appraisal through coercion, extortion, or bribery;
- performing any action that would have warranted the denial of a license;
- demonstrating negligence or incompetence in performing any act requiring a real estate license;
- failing to exercise reasonable supervision over the acts of salespeople;
- using their employment by a government agency in such a way as to violate the confidentiality of the access provided;
- violating any terms, conditions, or limitations of a restricted license;

- inducing the listing of residential property because of increase in crime, decline of quality in the schools, or loss of value caused by the entry or prospective entry into the community of people of another race, color, religion, ancestry, or national origin (blockbusting);
- violating any provision of the Franchise Investment Law (discussed later in this unit);
- violating any provision of the Corporate Securities Code; and
- failing, as agent for the buyer, to disclose any direct or indirect ownership in the property being purchased;
- intentionally delaying the closing of a mortgage loan for the sole purpose of increasing interest, cost fees, or charges payable by the borrower;
- providing the lender an inaccurate opinion of value in a debt forgiveness sale (short sale) to obtain a financial advantage (listing or sale commission);
- influencing or attempting to influence an appraisal through coercion, extortion, or bribery;
- failing to deliver mortgage loan funds (mortgage broker) in accordance with a commitment to do so when the broker is the lender or is authorized to do so by the lender;
- committing any act that indicates an applicant is not honest or truthful (this includes acts that resulted in denial or revocation of a license by any other governmental agency);
- willfully destroying or falsifying records required to be maintained by the Bureau of Real Estate;
- being incarcerated after a felony conviction (the Bureau of Real Estate can automatically suspend the license); and
- being on the list of the 500 largest tax delinquencies in excess of \$100,000 (the Bureau of Real Estate must suspend the license).

The DRE is limited to a seven-year lookback period to consider prior criminal convictions to deny or revoke a license—and then only if the crime is substantially related to qualifications of a real estate licensee. There is an exception for sex offenders and serious felonies.

The DRE is precluded from inquiring as to a licensee's citizenship.

To revoke or suspend a license, the Bureau of Real Estate must show “convincing proof to a reasonable certainty,” not proof beyond a reasonable doubt (*Realty Projects Inc. v. Smith* (1973) 32 C.A.3d 204).

After 10 years, a licensee can petition the DRE to remove online postings of disciplinary actions taken against the licensee.

CASE STUDY In *Madrid v. Department of Real Estate* (1984) 152 C.A.3d 454, an applicant for a real estate license neglected to disclose an out-of-state conviction five years earlier for bingo fraud but did disclose a 20-year-old conviction for contracting without a license. The plaintiff claimed to have forgotten about the conviction and claimed the license revocation was improper. While failure to disclose a minor matter could be excused, the court held this to be a major matter and a recent conviction that was omitted knowingly. Because knowledge of the conviction would have justified denial of license, revocation of the plaintiff's license was held to be proper.

Statute of Limitations

Disciplinary action must be brought within three years of the wrongful act except in the case of fraud, where it is three years after the act or one year after discovery, whichever comes later, but in no event later than 10 years from the wrongful act (Business and Professions Code Section 10101).

Restricted Licenses

Probationary or restricted real estate licenses may be granted by the commissioner after a license has been revoked, suspended, or denied subsequent to a hearing.

The **restricted license** can be restricted to a period of time, to the type or area of activity, or to employment by a particular broker (salesperson). The commissioner can require detailed reports of each transaction, a surety bond, other conditions, or a combination of conditions.

While a regular real estate license is considered a property right that cannot be taken away without due process of the law, the holder of a restricted license does not have property rights.

The restricted licensee has no automatic right to renewal. The commissioner can suspend a restricted license for a violation before a formal hearing; however, revocation requires a hearing.

As a condition of issuance of a restricted license, the commissioner can require that the continuing education requirements be met.

Consumer Recovery Account

The Consumer Recovery Account provides restitution to members of the public who suffer a loss because of a wrongful act of a real estate licensee.

An aggrieved party who obtains an uncollectible judgment against a licensee because of fraud, misrepresentation, deceit, or conversion of trust funds can apply to the DRE for recovery from the recovery account. The recovery account will pay only if the wrongful act required a real estate license.

Up to a maximum of \$50,000 will be paid to the claimants because of any one transaction, regardless of the number of people injured or the number of licensees involved (Business and Professions Code Section 10471(b)).

No more than \$250,000 will be paid out for multiple claims against one licensee (Business and Professions Code Section 10474(c)).

Should the recovery account pay a claim because of a licensee, the licensee's license automatically will be suspended. No reinstatement will be made until the recovery account has been repaid, including prevailing interest. A discharge in bankruptcy will not relieve a person from the repayment requirements for reinstatement. Repayment to the recovery account will not nullify or modify any other disciplinary action that is brought because of the licensee's actions.

An undocumented alien is not entitled to compensation from the recovery account.

MORTGAGE BROKERS

WEB LINK



Rules and regulations regarding mortgage loan broker activities can be found on the DRE website, www.dre.ca.gov/licensees. RE7 is the Mortgage Loan Broker Compliance Evaluation Manual and includes the **RE7A Mortgage Loan Broker Compliance Checklist**.

Mortgage loan brokers make or arrange loans for compensation. The mortgage loan broker is thus a middleman, matching borrowers and lenders. The mortgage loan broker has the duty of fair dealing to both lenders and borrowers.

Business and Professions Code Section 10131(d) requires that a person who solicits borrowers and lenders, makes loans, or performs services for borrowers and lenders when such loans are secured by real property be licensed as a real estate broker and be subject to the regulations of the real estate commissioner. While owners normally can sell their own property without a license, an owner who engages in eight or more trust deed transactions within one year must have a broker's license.

CASE STUDY The case of *Direnfield v. Stabile* (1988) 198 C.A.3d 126 involved an unemployed licensed real estate salesman who arranged loans in which Direnfield was the lender. While previously employed by a broker, Stabile had arranged other loans for Direnfield. The loans he arranged while unemployed were for 30% interest. Two years later, the borrowers sued Direnfield for usury because the loans were not made through a real estate broker. A settlement allowed Direnfield only the return of principal. Direnfield sued Stabile for failing to disclose that he was not employed by a broker. Stabile could not pay the judgment granted, so Direnfield requested payment from the recovery fund.

The Court of Appeal held that the recovery fund can be required to pay for an action of an unemployed salesperson because the salesperson's license was not terminated while the salesperson was unemployed. (Direnfield was limited to interest at the statutory rate [7%], not the 30% rate of the loan.).

The license requirements apply to the sale, exchange, and servicing of existing loans, as well as to arranging new loans (Business and Professions Code Section 10131(e)).

People who make loan collections on 10 or fewer loans and do not negotiate loans need not be licensed as brokers. A person who collects on more than 10 loans or collects an amount exceeding \$40,000 per year must either have a broker's license or apply to the real estate commissioner for an exemption. To obtain the exemption, the person must agree to comply with the provisions of the real estate law and the commissioner's regulations and must post a bond or other security to protect client funds.

Article 5 of the real estate law (Business and Professions Code Sections 10230–10236.1) governs transactions in trust deeds and real property sales contracts. The provisions of Article 5 do not apply to one- to four-residential-unit sales involving seller carryback financing. The provisions of Article 5 also do not apply when the broker has a direct or an indirect monetary interest as a party to the transaction (Business and Professions Code Section 10230(a)).

Article 5 provisions include the following:

- Brokers cannot accept funds from prospective real property lenders unless the broker has a specific loan arranged for the funds (Business and Professions Code Section 10231).
- In servicing a real property loan, the broker cannot retain funds for more than 25 days unless there is a written agreement with the purchaser or lender, in which case the interest must be paid on the funds retained.
- A real estate broker is prohibited from advertising or giving gifts or premiums to prospective purchasers or lenders as an inducement for making a loan (Business and Professions Code Section 10236.1).

- Any real estate licensee who undertakes to service a loan must have written authorization from the purchaser or the lender of the loan (Business and Professions Code Section 10233).
- If a broker who is servicing a loan remits funds other than the funds of the obligor (the broker advances the funds), then within 10 days of such payment, the broker must notify the holder of the loan as to the source of the funds and the reason for making the advance (Business and Professions Code Section 10233.1).
- If the broker is going to benefit directly or indirectly by the loan, other than commission or fees, the broker must notify the Bureau of Real Estate and lender or purchaser of the facts (Business and Professions Code Section 10231.2).
- The mortgage broker who places a loan must deliver copies of any deed of trust to the investor or lender and to the borrower.
- Real estate licensees who negotiate loans secured by real property must have the instruments recorded before the disbursement of funds unless the lender authorizes prior release, in which case within 10 days of the release of funds the broker must either record the trust deed or deliver it to the lender with a written recommendation that it be recorded immediately.
- If the licensee arranges an assignment of an existing trust deed or sales contract, she must have the assignment recorded within 10 working days after close of escrow or deliver the trust deed or sales contract to the purchaser with the written recommendation that it be recorded immediately (Business and Professions Code Section 10234).

Advertising

Advertising a specific yield greater than the rate stated on the note is misleading advertising unless the ad also includes the actual interest rates and purchase discount.

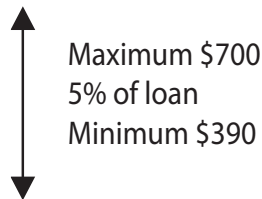
Mortgage loan brokers must include their license number in their advertising soliciting borrowers or investors. They must also include a telephone number, established by the DRE, to enable consumers to check on the broker's licensed status. The advertising requirements for loan and investor solicitation are similar to those for first point of contact for real estate licensees.

Costs and Charges

Article 7 of the real estate law (Business and Professions Code Sections 10240–10248.3) covers loan broker maximum costs and commissions, as well as loan payment requirements. This article applies only to regulated loans (first trust deeds of less than \$30,000 and second trust deeds of less than \$20,000). Larger loans have no upper limit on costs and fees.

Mortgage Broker Costs for Regulated Loans

Loan broker costs for a regulated loan (first loans of less than \$30,000 and second loans of less than \$20,000) cannot exceed actual costs and expenses, and are limited to 5% of the loan or \$390, whichever is greater, but in no event more than \$700. For example, for a loan of \$2,000, the costs can be up to \$390 (5% or \$390, whichever is greater), and for a \$19,000 loan the costs cannot exceed \$700 (5% is \$950, but the maximum that can be charged is \$700). Examples of costs are appraisal fees, escrow charges, title insurance, notary fees, and credit report charges.



Mortgage Broker Commissions for Regulated Loans

The loan broker commission for negotiating a regulated loan also is limited. For first trust deeds up to three years, the maximum commission is 5% of the amount borrowed; and for three years or more, it is 10%. For second trust deeds up to two years, the maximum commission is 5%; for more than two years, but less than three years, it is 10%; and for three years or more, it is 15%.

		2 Years	3 Years
First Trust Deeds		5%	10%
Second Trust Deeds	5%	10%	15%

If a broker charges more than the maximum allowable fees or costs, the borrower may recover three times the excess fees or costs charged (Business and Professions Code Section 10246).

The broker may not enter into an exclusive agreement with a prospective borrower to procure a loan that ties up the borrower for more than 45 days (Business and Professions Code Section 10243).

The licensee may not condition the granting of a loan on the purchase of credit group life or disability insurance.

Late Charges

Late charges after 10 days may not exceed 10% of the installment due, with a minimum late charge of \$5. (For loans not made through loan brokers, the late charge generally is limited to 6%.) Late charges may not be pyramided.

Prepayment Fees

Loans on owner-occupied single-family dwellings may be prepaid at any time, but prepayments within seven years may be subject to prepayment penalties. (For residential loans

made by other than loan brokers, prepayment penalties may not be imposed after five years, but if owner-occupied, the prepayment penalties are limited to three years.) Prepayment penalties may not exceed six months' interest. Up to 20% of the loan always can be prepaid in any 12-month year without penalty (Business and Professions Code Section 10242.6).

When loans are made without consideration of borrowers' ability to pay (predatory lending), prepayment penalties are limited to the first 36 months.

Loans made by loan brokers must have substantially equal payments.

Balloon payments (payments greater than twice the amount of the smallest payment) may not be imposed on a loan secured by an owner-occupied dwelling if the loan is for six years or less.

CASE STUDY The case of *Carboni v. Arrospide* (1991) 2 C.A.4th 76 involved a \$4,000 broker loan bearing interest at 200% that was originally due in three months. Additional advances were made by the broker totaling \$99,346, all at the 200% rate. By the time of trial for judicial foreclosure and deficiency judgment, accumulated interest was nearly \$390,000. The trial court wrote, "While in regard to short-term loans of 90 days or so, as was anticipated here, interest at the rate of 200% per annum may or may not shock the conscience of the court, interest at that rate for one and one-half years does." The trial court set the interest at 24%. The Court of Appeal affirmed, explaining that Civil Code Section 1670.5 allows a court to refuse to enforce an unconscionable contract or to modify it to avoid an unconscionable result.

Usury laws (laws setting the maximum interest rates that can be charged) do not apply to loans made or arranged by loan brokers. Even though loans made by real estate brokers may be exempt from usury limits, they are not necessarily without limits.

Brokers who use their own funds wholly or in part for a loan must notify the borrower before the close of escrow (Business and Professions Code Section 10241.2).

Every loan broker who negotiates a loan to be secured by real estate must deliver to the borrower a statement in writing containing all the cost information, as well as the loan terms. This statement must be delivered within three business days after receipt of a completed written loan application or before the borrower becomes obligated, whichever is earlier. The broker must keep a copy of the statement, signed by the borrower, for three years.

Disclosures

Article 7 requires a real estate broker who makes or arranges a mortgage loan of any kind or in any amount to present a **Mortgage Loan Disclosure Statement** to the borrower within three days of receipt of a completed loan application. The borrower's signature on the disclosure must be obtained before the time that the borrower becomes obligated to

make the loan. The disclosure requires that specific important features of the loan be set forth.

Brokers who arrange loans must provide the purchaser with a Lender/Purchaser Disclosure Statement, providing information regarding the loan, and a statement of the property's fair market value, as determined by an appraisal, as well as a copy of the appraisal. The lender or the purchaser must also be given a copy of the loan application and credit report, and the option of purchasing a title policy.

REAL PROPERTY SYNDICATES

The Division of Corporations has jurisdiction over both corporate and noncorporate syndicates. Broker/dealers licensed by the Division of Corporations can sell syndicate interests.

The Division of Corporations has transferred control of noncorporate syndicates having 100 or fewer investors to the Department of Real Estate. Real estate brokers are exempt from licensing requirements of the Corporations Code when selling these interests.

A real estate broker's violation of the Corporations Code can be the basis of disciplinary action by the real estate commissioner.

MINERAL, OIL, AND GAS BROKERS

New mineral, oil, and gas (MOG) licenses have not been issued since 1993. However, existing MOG licenses may be renewed every four years for the life of the holder. A person holding a real estate broker's license can engage in MOG transactions without additional licensing or qualifications. Anyone engaged in a MOG transaction without holding a valid MOG or real estate license could be fined up to \$500 and/or face imprisonment for up to six months. Grounds for revocation or suspension of MOG licenses are similar to the grounds for revocation or suspension of real estate licenses and are set forth in Section 10561 of the Business and Professions Code.

The permits and licenses once necessary to handle MOG transactions are no longer required. This special licensing was initially established due to past sales abuses. Investors were sold parcels in oil and gas subdivisions that were touted as great investments offering fantastic potential. However, in some cases, the parcels sold had remote if any possibility of containing oil or gas products. Eventually, a number of promoters were convicted of grand theft, and approximately 600 real estate salespeople and brokers had their licenses revoked. The licensing and activities of **MOG brokers** have now been placed under the Department of Real Estate.

FEDERAL SECURE AND FAIR ENFORCEMENT FOR MORTGAGE LICENSING ACT OF 2008 (SAFE ACT)

The purpose of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) is to protect borrowers in mortgage loan transactions and to reduce fraud. Every state must have a licensing system for residential mortgage originators. A registry of mortgage originators is maintained by the Nationwide Mortgage Licensing System and Registry (NMLS).

California real estate licensees may engage in business as mortgage loan originators only if they obtain a real estate license endorsement identifying themselves as a licensed mortgage loan originator. License endorsements are valid for a period of one year and expire on December 31 of each year.

Licensing requires specified prelicensing education and a national and state examination.

Any person who acts as a mortgage loan originator without an MLO license endorsement is guilty of a crime punishable by six months in prison plus a \$20,000 fine, as well as being grounds for denial or revocation of a real estate license.

ESCROW AGENT

The regulation of escrows is covered in Division 6 of the California Financial Code and requires that escrow agents be licensed by the commissioner of corporations.

Among those exempted are real estate brokers licensed by the real estate commissioner while performing acts in the course of or incidental to real estate transactions in which the brokers are principals or acting as agents in performing acts for which a real estate license is required (Financial Code Section 17006(d)).

The Division of Corporations has interpreted this exemption to be personal to the broker. The broker cannot set up an association with other brokers to conduct escrows or contract out the escrow services. The broker cannot advertise escrow services without making it clear that the services are only incidental to real estate transactions.

Escrows are covered in detail in Unit 14.

MOBILE HOME SALES

Mobile homes are factory-built housing units that are transported to a site on their own chassis. They are usually set up on a permanent foundation and connected to utilities.

Once considered only temporary homes or for travel, mobile homes are today used as principal residences or stationary vacation homes. Their relatively low cost has resulted in growing numbers of mobile home parks in some communities. They make up a significant portion of single-family housing priced under \$100,000.

Since July 1975, real estate licensees have been granted limited rights to act as agents in the sale of mobile homes. They can list and sell these mobile homes in rental spaces, as well as with the land. Salespeople sometimes specialize in mobile home sales in particular, while some specialize in specific mobile home parks. In so acting, they are subject to these limitations:

- The mobile home must be in place. It must be able to remain on its rented lot. If the mobile home is sold with a lot, the lot must be zoned properly so the home can remain.
- Real estate licensees cannot advertise that no down payment is required for a mobile home when in fact secondary financing will be used to finance the down payment.
- Real estate licensees must withdraw all advertising of a mobile home for sale within 48 hours after receipt of notice that the mobile home is no longer available for sale, lease, or financing.
- A real estate broker who is not also licensed as a mobile home dealer may not have an office where two or more mobile homes are displayed and offered for sale. (There is a separate license for mobile home sales.)
- A real estate licensee is prohibited from prorating license or title fees unless the buyer and the seller agree to the proration, or the licensee was required to pay the fees to avoid penalties for late payment.
- A licensee may not represent that the mobile home can be transported over California highways unless it meets all physical requirements for such transport. The licensee must reveal any material facts pertaining to the equipment requirements.
- The licensee must have all transfer papers delivered. Mobile homes must be registered annually with the Department of Housing and Community Development (HCD). Formerly, registration was required with the Department of Motor Vehicles. Exceptions to the annual registration and license fees are mobile homes sold new on or after July 1, 1980, mobile homes affixed to a permanent foundation, and mobile homes sold before July 1, 1980, that have become more than 120 days delinquent in the payment of license fees.
- Mobile homes not subject to annual registration are registered only at the time of title transfer. These homes are on local property tax rolls.
- Not later than 10 calendar days after the sale of a used mobile home that is subject to registration, the broker must supply written notice of the transfer to the Department of Housing and Community Development. For details on transferring title and registering a mobile home, see Section 18100.5 et seq. of the Health and Safety Code. The Department of Housing and Community Development has a toll-free number for mobile home transfer information: 800-452-8356.
- Real estate licensees cannot include any added license or transfer fee if such a fee is not due to the state.

Exceptions to the limitations set forth are mobile homes attached to a permanent foundation so they have become real property. The four prerequisites for a mobile home to become real property are

1. obtaining a building permit,
2. placing the mobile home on a permanent foundation,
3. obtaining a certificate of occupancy, and
4. recording a document reflecting that the mobile home has been affixed to a foundation.

Section 10177.2 of the Business and Professions Code provides for the discipline of a licensee who

- used a fictitious name in the registration of a mobile home or knowingly concealed any fact in the registration or otherwise committed fraud in the registration application;
- failed to provide for the delivery of a properly endorsed certificate of ownership or certificate of title from the seller to the buyer;
- knowingly participated in the acquisition or sale of a stolen mobile home;
- submitted a bad check to the Department of Housing and Community Development; or
- violated other provisions of the California codes.

There is a Manufactured Home Recovery Fund similar to the Real Estate Consumer Recovery Account. After receiving a final judgment against a dealer or salesperson for failure to honor warranties, fraud, or willful misrepresentation, a claimant can receive a maximum of \$75,000 from the fund.

ADVANCE FEE RENTAL AGENTS

There is a separate license available to operate a prepaid rental listing service (PRLS). No examination is required for a two-year PRLS license. Licensed real estate brokers are exempt from this requirement (Business and Professions Code Section 10167 et seq.). A \$10,000 surety bond is required for each location that a PRLS licensee maintains.

Licensees must provide a prospective tenant with a DRE-approved written contract that describes the services to be provided and the prospective tenant's needs.

If the licensee fails to provide a list of at least three rental properties to the prospective tenant within five days, the advance fee must be refunded in full.

The licensee must refund within 10 days of a request any amount more than \$50 in charges if the prospective tenant does not obtain a rental through the licensee and demands a return within 10 days of expiration of the contract. The right to refund must be set forth in boldface type (Business and Professions Code Section 10167.10). For example,

if a prospective tenant paid a \$100 advance fee and qualified for a refund, \$50 would be refunded to the prospective tenant.

The licensee must not knowingly refer a property to a prospective tenant where

- the property does not exist or is not available for occupancy;
- the property has been described by the licensee in a false, misleading, or deceptive manner;
- the licensee has not confirmed the availability of the property during the four-day period preceding the referral (however, it is not a violation to refer property when availability was not confirmed from five to seven days after the last confirmation if the licensee has made a good-faith effort to confirm availability); or
- the licensee has not obtained written or oral permission to list the property from the owner or agent.

BUSINESS OPPORTUNITY BROKERS

A business opportunity broker sells or leases an existing business enterprise, including its goodwill. While real estate might be included with a business opportunity sale, generally all that is sold is personal property. At one time, separate licensing was available to those engaged in the sale or lease of business opportunities. Since 1966, however, a real estate license has been required to engage in such transactions.

In business opportunity sales, more than in any other transaction, buyers tend to rely on the broker's expertise. The danger of dual agency is always present. Brokers must make their status clear to prospective buyers.

For protection, the broker should not repeat the owner's oral statements about gross or net income, but should instead ask for copies of the seller's federal tax returns and state sales tax returns and get the seller's permission to disclose the information to prospective purchasers. Even then, the broker must indicate to prospective purchasers that the information was supplied by the owner and that the broker does not warrant its authenticity. The broker could still be liable if a court determined the broker should have doubted the information provided by the owner.

The broker must make sure that the purchaser is protected.

Some of the items for consideration are

- transferability of leases;
- obtaining of necessary licenses and permits;
- compliance with the Bulk Sales Act;
- compliance with the fictitious name requirements (Business and Professions Code Section 17900 et seq.);
- obtaining a clearance receipt from the board of equalization certifying that prior sales tax has been paid, so that the purchaser is not liable for the unpaid sales taxes

(under **successor liability**, the purchaser of a business is liable for sales taxes collected but not remitted to the state by the prior owner of the business);

- complete agreement as to terms consistent with such a sale, such as covenant not to compete; and
- obtaining agreement on apportionment of the sales price for tax purposes.

Failure to protect the purchaser might be considered negligence on the part of the broker and subject the broker to damages and/or disciplinary action.

CASE STUDY In the case of *Salazar v. Interland* (2007) 152 C.A. 4th 1031, Salazar, doing business as Los Angeles Technology, learned that AT&T was interested in selling its small business web hosting. Salazar contacted Host Pro, which was owned by Interland, Inc., and arranged meetings with AT&T. The meetings resulted in Host Pro acquiring 150,000 AT&T customers. Host Pro had agreed to pay Salazar a commission based on fees. Interland, the parent company, refused to pay Salazar because Salazar did not hold a real estate broker's license required to sell a business opportunity. Salazar claimed it was not a business opportunity because it was not the sale of company stock or even a substantial part of AT&T's business.

Salazar sued for \$20 million damages. The superior court ruled that Salazar was not entitled to any commission because he did not hold a broker's license as required by Business and Professions Code Sections 10030 and 10130 for the business opportunity sales.

The Court of Appeal affirmed, ruling that a business opportunity sale does not have to involve the sale of an entire business. It can be the sale of business assets, customer contracts, and goodwill. The statute prohibits the collection of compensation by an unlicensed business opportunity broker.

Bulk Sales Act

The **Bulk Sales Act** (Commercial Code Sections 6101–6111) is of particular interest to brokers engaged in the sale of business opportunities. A bulk sale is a sale not in the course of the seller's ordinary business. The sale of the seller's business or a substantial part of the materials, supplies, merchandise, or other inventory would be a bulk sale. The Bulk Sales Act is intended to give notice to the creditors of the seller so that they can protect their interests.

Compliance with the act requires

- recording of a notice of sale at least 12 business days before the sale is to be consummated;
- publishing of a notice in a newspaper of general circulation within the judicial district in which the property is located at least 12 business days before the sale; and
- sending of a registered or certified letter to the county tax collector at least 12 business days before the sale.

Such notice must include the

- statement that a bulk transfer is to be made;
- name and address of the transferor and transferee and all other business names and addresses used by the transferor within three years, as far as known by the transferee;
- location and general description of the property to be transferred;
- place and date on which the bulk transfer is to be consummated; and
- name and address of the person with whom claims may be filed and the last date for filing claims.

If the sale is to be made by auction, notice that the sale is to be made by auction must be given, including the name of the auctioneer and the time and place of the auction.

If the bulk sales notice provides for an escrow, the buyer must deposit the full purchase price with the escrow holder.

When statutory notices are not complied with, the sale is fraudulent and void with regard to those creditors who hold claims based on transactions before the bulk transfer. In such cases, the creditors could have rights superior to the purchaser.

In the case of an auction, the responsibility for notices rests on the auctioneer. Failure to comply does not render an auction sale fraudulent and void, but the auctioneer is held personally liable to the transferor's creditors up to the reasonable value of the assets sold.

Franchise Sales

A franchise is a contract by which a business operator (franchisee) is granted, for some payment, the right to engage in a business of marketing goods or services under a plan or system prescribed by the seller of the franchise (franchisor) and associated with the franchisor's name, trademark, logo, advertising, or other commercial symbol. Agreements between petroleum companies and distributors and retailers to use brand identification or lease agreements allowing the sale of products under a trade identification are examples of franchises.

Because of the advantages of national advertising and training programs, a tremendous growth in real estate franchises has occurred.

Franchise sales are regulated by the **Franchise Investment Law**, which requires disclosure from the franchisor to the franchisee. The California commissioner of corporations controls sales, and franchise offerings must be registered with the commissioner before sale. Exempt from registration are franchisors with a net worth of \$5 million or more that have had a minimum of 25 franchises in operation during the five years before the sale. Most major real estate franchisors therefore would be exempt from registration.

Required disclosures must be set forth in an offering prospectus, which must be delivered to a prospective purchaser at least 10 business days before a binding franchise agreement or the receipt of any consideration, whichever comes first.

The disclosure requirements enable prospective franchisees to make a decision based on a full understanding of the duties and rights of the franchisor and franchisee. The purpose of the law is to protect against fraud or the likelihood that the franchisor promises will not be met.

Three groups of people are authorized to sell franchises:

1. The person identified in the application for offering (the franchisor or agent)
2. A person licensed by the Department of Real Estate as a broker or salesperson
3. A person licensed by the commissioner of corporations as a broker/dealer

APPRAISERS

Title XI, Real Estate Appraisal Reform Amendment of the federal Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989, requires that appraisers be licensed or certified by the state for real estate transactions involving federal financial and public policy interests. This covers loans made by practically all of our financial institutions.

Every state must enact legislation to provide for certification, which is consistent with criteria established by the Appraisal Foundation, a private nonprofit corporation. Certification must be in residential and general categories (general includes income as well as residential property). An examination is required without exception. For federally related transactions that do not require a certified appraiser, the appraiser must be licensed. The criteria for licensing must be consistent with Title XI. Every state must set minimum appraiser standards, even for appraisals that are not federally related.

Business and Professions Code Sections 11300–11421 enact the Real Estate Appraisers Licensing and Certification Law (California). The Bureau of Real Estate Appraisers (BREA) within the Business, Transportation, and Housing Agency administers and enforces the law. (The website for BREA is www.orea.ca.gov.) The law also created a Real Estate Appraisers Regulation Fund, which includes a recovery account similar to the Real Estate Recovery Account.

WEB LINK



The law prohibits any licensed or certified appraiser from making an appraisal where the appraised value affects the appraiser's compensation.

FAIR HOUSING

Fair housing laws mandate that real estate licensees deal with buyers, sellers, lessors, and lessees in a nondiscriminatory manner. Besides the legal penalties of our various fair housing laws, violations of fair housing legislation may be the basis of disciplinary action by the Department of Real Estate.

Federal Laws

Federal and state fair housing legislation overlaps. A single act can violate more than one fair housing act.

Civil Rights Act of 1866 The Civil Rights Act of 1866 (C.31, 14 Stat. 27) gave citizens of all races the same rights enjoyed by white citizens to inherit, purchase, lease, sell, or hold real and personal property. This act covered only race.

For many years, the act was ineffective because of the narrow court interpretation that it did not apply to private property. The Supreme Court really nullified the effect of this act.

Under the act, an aggrieved party may sue in federal court for damages, obtain an injunction to prohibit the sale to another, or obtain an order forcing the owner to sell.

CASE STUDY In *Jones v. Mayer* (1968) 392 U.S. 409, the U.S. Supreme Court held the act to be valid under the Thirteenth Amendment. In this case, an owner refused to sell his own house because of race. The court determined that the act prohibits all racial discrimination (both public and private) in the sale or rental of property.

Federal Fair Housing Act

Title VIII of the **Civil Rights Act of 1968** prohibits discrimination in housing based on race, color, religion, or national origin. In 1974, the Housing and Community Development Act added sex to the list of protected classes. In 1988, the **Fair Housing Amendments Act** added disability and familial status. Today, these laws are known as the federal Fair Housing Act. The **Fair Housing Act** prohibits discrimination on the basis of race, color, religion, sex, disability, familial status, or national origin. Real estate licensees must not take part in these activities, regardless of the wishes of their principals. Familial status refers to those under the age of 18 living with a parent or guardian, those in the process of settling legal custody issues, people in the adoption process, and any pregnant person. Exempt from discrimination on the basis of familial status are communities having at least 80% of the units occupied by at least one person 55 years of age or older. Also exempt are housing units intended for and solely occupied by people 62 years of age or older.

CASE STUDY The case of *Taylor v. Rancho Santa Barbara* (2000) 206 F.3d 932 involved a buyer of a mobile home who was refused a rental agreement because he was under 55 years of age. The plaintiff challenged the constitutionality of amendments to the Fair Housing Act that eliminated the requirement that senior citizen housing provide special services and facilities for seniors. He also challenged the California Mobilehome Residency Law (MRL) that authorizes age restrictions complying with federal law. The basis of the plaintiff's action was a violation of the Fourteenth Amendment's equal protection clause, as well as the Fifth Amendment's due process clause. The case was dismissed by the U.S. District Court for failure to state a claim, and the Court of Appeal affirmed that neither the federal nor the California laws violate the Constitution. Age-restrictive apartments and mobile home communities are an exception to antidiscrimination statutes based on family status. The court pointed out the rational basis of these laws was to provide inexpensive housing for retirees on fixed incomes.

Even if an apartment complex has a family section, designation of an area as *all adult* is prohibited. Steering prospective tenants toward a particular area in an apartment complex and away from another area would also violate the act.

Apartments can have rules for children's use of facilities when there is a nondiscriminatory reason for the difference in rules. The act does not prohibit owners from setting maximum occupancy of units as long as the rule is enforced without discrimination (unreasonably limited occupancy rules are likely to be unenforceable).

A disability is a physical or mental impairment. The term includes those having a history of, or being regarded as having, an impairment that substantially limits one or more major life activities. People who have AIDS are protected by the fair housing laws under this classification. The law specifically prohibits discrimination against guide dogs and support animals.

The landlord must make reasonable adjustments to rules, policies, practices, or services to afford people with disabilities the equal opportunity to enjoy a unit.

CASE STUDY In the case of *Auburn Woods I Homeowners Association v. Fair Employment and Housing Council* (2004) 121 C.A.4th 1578, condominium residents who were suffering from depression were precluded from having a dog because it violated rules of the homeowners association. The California Fair Employment and Housing Commission charged the homeowners association with disability discrimination by failure to make reasonable accommodations. The administrative law judge ruled that the couple was disabled and the association discriminated against them. The superior court ruled for the homeowners association because there was no medical evidence that a companion dog was a necessary reasonable accommodation.

The Court of Appeal reversed, ruling that there was substantial evidence to support the CFEHC decision in favor of the condominium owners. Because the couple improved when they had the dog but regressed when they had to give it up, the association must allow the dog.

Note: While this ruling was fact-specific to this situation, which involved a condominium association, it would seem to be applicable to apartment dwellers as well. Even if an animal does not qualify as a service animal, a landlord could apparently be liable for refusing an animal necessary for emotional support.

CASE STUDY *Giebler v. M & B Associates a Limited Partnership* (2003) 343 F.3d 1143 involved a plaintiff who has AIDS and is disabled. He had income of \$837 per month from Social Security disability and between \$300 and \$400 per month from Housing Opportunities for People with AIDS.

Plaintiff was denied a rental because his income did not meet the landlord's requirements of three times the monthly rent, although his credit and rental history were good. The plaintiff's mother, who lived nearby and has adequate income and excellent credit, wanted to sign the lease but was rejected because of the landlord's policy of no cosigners.

Giebler brought action under the federal Fair Housing Amendments Act, California's Fair Employment and Housing Act, and the Unruh Act, alleging intentional discrimination for failure to reasonably accommodate Giebler's disability by refusal to accept a cosigner.

The U.S. District Court ruled for the landlord stating, "An accommodation which remedies the economic status of a disabled person is not an accommodation as contemplated by FHAA."

The Ninth Circuit reversed, ruling that the FHAA includes reasonable economic accommodations to disabled tenant applicants rather than an inflexible rental policy barring cosigners. The court pointed out that renting to Giebler's mother would not be an economic burden to the landlord and would be a reasonable accommodation to a disabled resident.

The landlord also must allow the tenant, at the tenant's expense, to make reasonable alterations to the common area that is necessary for the tenant's use of that area. However, the tenant does not have to restore the common area at the end of the tenancy.

For four or more new rental units built after March 13, 1991, the act specifies structural requirements for access for people with disabilities.

Discrimination under the act includes charging families higher security fees, requiring additional fees for people with disabilities who modify their units, and, possibly, selective use of advertising media, as well as the models used for advertising.

The Civil Rights Act of 1968 prohibits

- discrimination by brokers toward clients and customers;
- refusal to show, rent, or sell through false representation that a property is not available;
- discrimination in access to multiple listing services;
- **steering**, that is, directing people of different races, religions, et cetera, away from or toward a particular area;
- discriminatory advertising—prohibited even when related to those activities exempt from the act;
- retaliatory acts against those making fair housing complaints and intimidation to discourage complaints;
- discriminatory sale or loan terms;
- **blockbusting**, that is, inducing panic selling by representing that prices will drop because of the entrance or possible entrance of minority groups; and
- **redlining**, that is, refusal to loan or insure within an area (*Harrison v. Heinzroth Mortgage Co.* (1977) 430 F. Supp. 893).

Exempted from the act are

- religious groups, which can discriminate in providing nonprofit housing, provided that the religion is open to all, regardless of race, sex, or national origin;
- private clubs, which can discriminate or give preference to members when selling or leasing housing for noncommercial purposes;
- owners of single-family homes, who can discriminate when selling or renting without an agent, provided they do not own more than three such homes and are not in the business; and
- owners of one to four residential units who occupy a unit, who can discriminate when renting without an agent.

Note: Neither the Civil Rights Act of 1866 nor California fair housing laws include these exemptions.

WEB LINK



The federal Fair Housing Act is enforced by the Department of Housing and Urban Development (HUD). The HUD website for the Office of Fair Housing and Equal Opportunity is www.hud.gov/fairhousing. While HUD can initiate complaints on its own, aggrieved parties may take either of two courses:

1. They may bring a complaint to HUD within one year of the discriminatory action. A hearing on the complaint would be held before an administrative law judge, who can assess civil penalties from \$10,000 to \$50,000, as well as actual damage and compensation for humiliation suffered because of discriminatory practices.
2. They may bring a civil action in state or federal district court within two years after the occurrence. In this case the court could award
 - actual damages plus punitive damages, court costs, and attorney fees; and
 - a permanent or temporary injunction or restraining order.

Failure of a broker to post in the broker's place of business the equal housing opportunity poster shown in Figure 4.2 can shift the burden onto the broker to prove an act was not discriminatory should a complaint be made.

CASE STUDY In the case of *Pfaff v. U.S. Dept. of Housing and Urban Development* (1996) 88 F.3d 739, a family of five was denied a 1,200-square-foot, two-bedroom rental because the owner felt that four people was the maximum based on size and the fact that the property lacked a basement or a backyard. HUD alleged violations of Title VIII of the Civil Rights Act of 1968, in that there was discrimination based on family size.

An administrative law judge ruled there was prima facie discrimination because the owner had not shown a business necessity for a numerical occupancy requirement and awarded \$4,212.61 in compensatory damages and \$20,000 in emotional distress damages plus an \$8,000 civil penalty. The Court of Appeal reversed, stating that the landlord did not have to rebut any prima facie case against them and did not have to prove a compelling business necessity to justify numerical occupancy guidelines, as HUD has no current occupancy guidelines. The owner's numerical restriction was not unreasonable to prevent dilapidation of the little house. The court held that "HUD's actions were well outside the tenets of good or acceptable government."

While the government was arbitrary in the previous case, the following case involved a landlord who appeared to be arbitrary in a similar situation.

FIGURE 4.2: Fair Housing Poster

U. S. Department of Housing and Urban Development

**EQUAL HOUSING
OPPORTUNITY****We Do Business in Accordance With the Federal Fair
Housing Law**

(The Fair Housing Amendments Act of 1988)

**It is illegal to Discriminate Against Any Person
Because of Race, Color, Religion, Sex,
Handicap, Familial Status, or National Origin**

- In the sale or rental of housing or residential lots
- In the provision of real estate brokerage services
- In advertising the sale or rental of housing
- In the appraisal of housing
- In the financing of housing
- Blockbusting is also illegal

Anyone who feels he or she has been discriminated against may file a complaint of housing discrimination:

1-800-669-9777 (Toll Free)

1-800-927-9275 (TTY)

www.hud.gov/fairhousing

**U.S. Department of Housing and
Urban Development
Assistant Secretary for Fair Housing and
Equal Opportunity
Washington, D.C. 20410**

FIGURE 4.2: Fair Housing Poster (continued)

U. S. Department of Housing and Urban Development
Departamento de la Vivienda y el Desarrollo Urbano de los EE.UU.



**EQUAL HOUSING
OPPORTUNITY**
IGUALDAD DE OPORTUNIDADES
EN LA VIVIENDA

**Nuestras prácticas de negocios cumplen la ley federal
de equidad en la vivienda**

(Enmienda a la ley de Equidad en la vivienda de 1988)

**Es ilegal discriminar contra ninguna persona a
causa de su raza, color, religión, sexo,
discapacidad, situación familiar u origen nacional**

- | | |
|------------------------------------------------------------------------|--------------------------------------------------------------------|
| ■ En la venta o el alquiler de viviendas o lotes residenciales | ■ En la provisión de servicios de corredores de bienes raíces |
| ■ En la publicidad relacionada con la venta o el alquiler de viviendas | ■ En la tasación de viviendas |
| ■ En la financiación de la vivienda | ■ Las tácticas de intimidación (Blockbusting) también son ilegales |

Cualquier persona que crea que ha sido discriminada puede presentar una reclamación de discriminación en la vivienda:

1-800-669-9777 (Línea gratuita)

1-800-927-9275 (TTY)

www.hud.gov/fairhousing

**U.S. Department of Housing and
Urban Development
Assistant Secretary for Fair Housing and
Equal Opportunity
Washington, D.C. 20410**

CASE STUDY In the case of *Fair Housing Council of Orange County Inc. v. Ayres* (1994) 855 F. Supp. 315, a landlord had an occupancy restriction of two people per unit. It was alleged to have a disparate impact on families with children and was therefore discriminatory as to familial status. Families with children were denied rental if there were more than two people in the household. Couples who had children while they were tenants were forced to leave.

The court indicated that this was a prima facie case of discrimination; therefore, the defendant had a burden to show legitimate nondiscriminatory justification for the restriction. The defendant failed to show such a reason. The defendant indicated that the purpose was to protect the units against excessive wear and tear. The court pointed out that this purpose could have been accomplished with higher security deposit, greater care in tenant selection, and more frequent inspections to protect the premises.

CASE STUDY The case of *Gilligan v. Jamco Development Corporation* (1997) 108 Fed.3d 246 involved a family who received federal aid to families with dependent children. In applying for a rental, they were denied because the income source was Aid to Families with Dependent Children (AFDC). The defendant never inquired as to the amount of income the Gilligan's were receiving, nor did they tell the Gilligan's the monthly rent. Instead, they were told that Verduga Gardens is not a, "welfare building," and they were refused the right to inspect a unit.

The court held that prospective tenants must be allowed to inspect, as well as apply for, residential units, and to refuse to accept a rental application from an AFDC or welfare recipient is illegal discrimination. While a review of their finances might reveal that they are unqualified to rent, their status as AFDC recipients does not make them unqualified to apply.

Americans with Disabilities Act (ADA)

The **Americans with Disabilities Act** prohibits discrimination in a place of public accommodation based on an individual's physical or mental disabilities. The law also prohibits employers having 15 or more employees from discriminating against employees with disabilities. Employers must alter the workplace to provide reasonable accommodations for disabled employees, unless it creates an undue hardship to the business.

A "place of public accommodation" refers to a facility with a nonresidential, commercial use (stores, offices, etc.). Owners and operators of commercial facilities, including property managers and lessees, must make the facilities accessible to the extent they are readily achievable. "Readily achievable" is defined as easily accomplished without a great deal of expense and is based on the relationship of the costs involved to the total property value, as well as the financial abilities of the person(s) involved. Under the ADA, new construction must be readily accessible and usable by people with disabilities as well, unless it is structurally impractical to do so.

CASE STUDY In the case of *Ability Center of Greater Toledo v. James E. Moline Builders, Inc.* (2020) 478 F. Supp. 3d 606, the issue was proper accessibility requirements met for new construction.

While the front door and a walkway to a covered area were not accessible to people in wheelchairs, there was a handicap route through the garage.

The court agreed with the plaintiff that the public use and common use areas were required to be accessible; entry through the garage sent people with disabilities a message that they were not welcome. The garage, although wheelchair accessible, did not meet the Fair Housing Act's accessibility requirements for newly constructed multifamily dwellings.

The defendant agreed to pay \$400,000 to Ability Center for costs and damages.

The ADA may be enforced by an action by the U.S. Attorney, or through a civil action by a private citizen. Maximum penalties include \$75,000 in civil penalties for the first violation, and \$150,000 for each subsequent violation, including compensatory damages and attorney fees.

CASE STUDY The case of *Madden v. Del Taco, Inc.* (2007) 150 C.A.4th 294, involved a customer, Madden, who was unable to navigate his wheelchair around a concrete trash can in the middle of a 42-inch wide sidewalk in order to enter a Del Taco.

The trial court granted summary judgment for Del Taco based on the fact that there was another entrance that was handicapped accessible and the blockage of the one entrance was temporary.

The Court of Appeal reversed, ruling that the Americans with Disabilities Act imposed a duty to remove architectural barriers to places of public accommodation, and in this case, removal of the barrier was readily achievable. This is a prima facie violation of ADA.

CASE STUDY The case of *Long v. Coast Resorts Inc.* (2002) 267 F.3d 918 involved the Orleans Hotel and Casino in Las Vegas. The hotel was built in 1997, well after the enactment of the Americans with Disabilities Act. There were 819 bathroom doors 28 inches wide, but ADA requires a 32-inch width for new construction. In addition, the casino bar areas were not accessible for people with disabilities.

The Court of Appeals ruled that the hotel must modify 819 of its rooms to expand the bathroom doors, as well as make the casino bar areas accessible.

Note: While architects should understand ADA requirements and building inspectors should check plans for ADA compliance, they don't always do so. In this case, it was a costly oversight.

CASE STUDY The case of *Lonberg v. Sanborn Theatres, Inc.* (2001) 259 F.3d 1029 involved a multiplex cinema that was not fully wheelchair accessible. The wheelchair-bound plaintiffs sued the theater operators, the lessor, and the architect based on the Americans with Disabilities Act.

The U.S. District Court granted partial summary judgment for the architect, because Title III of ADA does not name architects as possibly liable for discrimination. The Court of Appeals affirmed because the architect was not the owner, lessee, lessor, or operator.

Note: It appears that owners cannot rely on architects for compliance with ADA. Perhaps architects' contracts should contain an owner indemnity clause for failure to comply with ADA requirements.

CASE STUDY In the case of *Coronado v. Cobblestone Village Community Rentals LP* (2008) 163 C.A. 4th 831, a tenant was injured when his wheelchair toppled over a curb as he was trying to reach his parking space. The tenant alleged an Unruh Act and an Americans with Disabilities Act violation.

The trial court concluded that neither the Unruh Act nor the ADA applied because an apartment parking lot was a private common area and not a place of public accommodation.

The appeals court affirmed the ruling that apartment owners are not liable for failure to install a curb cut because it was not a place of public accommodation.

Note: The tenant could have modified the common area at the tenant's expense under the Fair Housing Amendment Act of 1988.

Advertising

The Civil Rights Act of 1968 prohibits discriminatory advertising; however, there has been little guidance as to what is discriminatory. The problem is that words may have different meanings to different ethnic groups, different meanings geographically, and meanings may even change by usage. The Department of Housing and Urban Development, which enforces fair housing laws, gave a partial clarification in a 1995 internal memo with the following five points.

1. *Race, Color, National Origin.* Complaints should not be filed for use of “master bedroom,” “rare find,” or “desirable neighborhood.” Some groups felt that “master” indicated slavery and “rare find,” and “desirable neighborhood” indicated areas without minorities.
2. *Religion.* Statements such as “apartment complex with chapel” or “services” such as “kosher meals available” do not, on their face, state a preference for people who

might use such facilities. Before HUD's memo, groups were advising that any reference in an ad to religion would violate the federal Fair Housing Act.

3. *Sex.* Use of the term “master bedroom,” “mother-in-law suite,” and “bachelor apartment” do not violate the act because they are commonly used physical descriptions.
4. *Disability.* Descriptions of properties such as “great view,” “fourth-floor walk-up,” and “walk-in closets” do not violate the Act. Services or facilities such as “jogging trails” or references to neighborhoods, such as “walk to bus stop,” do not violate the Act.

Because many people with disabilities cannot perform these activities, it was formerly thought that references to walking, biking, jogging, and so on would violate the law. It also is acceptable to describe the conduct required of residents such as “nonsmoking” or “sober.” You can't, however, say “nonsmokers” or “no alcoholics” because these describe persons, not barred activities. You can advertise accessibility features such as “wheelchair ramp.”

5. *Familial Status.* While advertisements may not contain a limitation on the number or ages of children or state a preference for adults, couples or singles, you are not “facially discriminatory” by advertising the properties as “two-bedroom, cozy, family room,” services and facilities with “no bicycles allowed,” or neighborhoods with “quiet streets.”

A number of organizations have made lists of what they consider acceptable as well as discriminatory advertising terms. Unfortunately, there is disagreement among these lists. The Miami Valley Fair Housing Center, Inc., has what many consider a reasonable list that can be viewed at www.mvfairhousing.com.

Because of the danger that an advertisement might be considered discriminatory, it is wisest to err on the side of caution, because penalties can be severe.

State Laws

Unruh Civil Rights Act “All persons within the jurisdiction of this state are free and equal, and no matter what their race, color, religion, ancestry, or national origin, are entitled to the full and equal accommodations, advantages, facilities, or services in all business establishments of every kind whatsoever” (Civil Code Section 51). Gender, disability, medical condition, marital status, and sexual orientation were added in 2006. In 2016, citizenship, primary language, or immigration status were added. Because real estate brokerage is a business, discrimination against clients or customers by a broker is a violation of the Unruh Civil Rights Act.

CASE STUDY The case of *Beliveau v. Caras* (1995) 873 F. Supp. 1393 involved an action brought to federal court based on a claim of **sexual harassment**.

A female tenant alleged a resident manager sexually harassed her. Among other things, the manager allegedly stared at her when she was lying by the pool in her swimsuit and made off-color flirtatious remarks. It was alleged that while making faucet repairs, the manager put his arm around her and told her she was an attractive woman and that he would like to keep her company. He made remarks about her breasts and grabbed her buttock when she walked away. In an action to dismiss, the court held that she had shown a good cause of action.

The court pointed out that discrimination may be based on a sexual harassment case. Offensive touching, if proved, would support a sexual harassment claim. If the manager was found to have sexually harassed the tenant, the owner of the property could be held liable under the doctrine of respondeat superior.

Note: This case could open a floodgate of allegations by tenants. To avoid false allegations, landlords and property managers should be careful about being alone with a tenant in an apartment.

The Unruh Act is enforced through civil action for damages.

Victims of discrimination can obtain

- a cease and desist order;
- a nondiscriminatory sale or loan terms;
- actual damages plus a penalty of three times actual damages with a minimum of \$4,000 per violation plus attorney fees.

The California Supreme Court held that the antidiscrimination provisions of the Unruh Civil Rights Act are not confined only to the limited category of protective classes but rather protect all people from any arbitrary discrimination by a business establishment (*Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721).

The small claims court has jurisdiction in cases involving the Unruh Act whose damages do not exceed \$10,000.

CASE STUDY In the case of *Hubert v. Williams* (1982) 133 C.A.3d Supp.1, a quadriplegic was evicted because his 24-hour-a-day attendant was alleged to be a lesbian, and the quadriplegic associated with homosexuals. The Unruh Act was held also to extend to discrimination based on sexual preference. The court held that if homosexuals are protected, then people who associate with this protected group also should be protected.

California Fair Employment and Housing Act (Rumford Act)

The **California Fair Employment and Housing Act** (Government Code Section 12900 et seq.) prohibits discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in supplying housing accommodations. The **Rumford Act** has been expanded to include all housing, including single-family residences. The only exception is renting to a roomer or boarder in a single-family house with no more than one roomer or boarder.

WEB LINK



Complaints under the act are brought within 60 days of the discriminatory action to the Department of Fair Employment and Housing (www.dfeh.ca.gov). The filing of such a complaint does not preclude the injured party from commencing an action under any other law.

The Department of Fair Employment and Housing will investigate and can order the owner to

- sell or rent the unit to the complainant, or
- offer to the complainant the next available unit, or
- pay civil damages up to \$50,000.

CASE STUDY The case of *Smith v. Fair Employment & Housing Commission* (1996) 12 C. 4th 1143 involved a landlord who refused to rent to an unmarried couple based on her religious convictions that to do so would be to condone sin.

The couple filed a complaint with the California Fair Employment and Housing Commission alleging violation of the Unruh Act, as well as California's Fair Employment and Housing Act. While an administrative law judge ruled in favor of the couple and awarded damages, the decision was appealed to the Court of Appeal where it was reversed.

The California Supreme Court reversed the Court of Appeal and pointed out that neither federal nor state law allows an exemption to a landlord for discrimination because of a personal contrary religious belief.

A constitutional amendment was enacted that barred the state from interfering with an owner's right to sell or lease his property. This amendment, which would have had the effect of repealing the Rumford Act, was held to violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

Business and Professions Code

Section 125.6 of California's Business and Professions Code provides that "every person who holds a license under the provisions of this code is subject to disciplinary action... if, because of the applicant's race, color, sex, religion, ancestry, disability, marital status,

or national origin, he or she refuses to perform the licensed activity or aids or incites the refusal to perform such licensed activity by another licensee... [or] makes any discrimination or restriction in the performance of the licensed activity.” The code would appear to cover any discriminatory practice committed while acting as a licensee.

California Omnibus Housing Nondiscrimination Act

This act makes all California acts dealing with discrimination consistent with the California Fair Employment and Housing Discrimination Act. Every act will apply to national origin, ancestry, race, color, gender, religion, marital status, familial status, disability, source of income, and sexual orientation. California courts prohibit discrimination that is arbitrary even when it is against groups not specifically protected by California law.

SUMMARY

The purpose of the real estate law is to protect the public. The Department of Real Estate administers the licensing of brokers and salespeople, as well as the regulation of their activities. This unit sets forth the activities requiring licensure, as well as those activities exempt from the real estate licensing requirements.

After a hearing, in accordance with the Administrative Procedure Act, licenses can be revoked, suspended, or denied for a number of specified violations. After a license has been revoked, suspended, or denied, the real estate commissioner has the power to grant a restricted license, which is probationary in nature.

If a member of the public is injured because of her dealings with a real estate licensee for an activity for which licensing is required, and the injured party obtains a judgment against the licensee that is uncollectible, the injured party can apply to the Department of Real Estate for reimbursement. Injured parties can collect up to a total of \$50,000 from the recovery account for any single transaction.

Besides the listing and sale of real property, licensing allows the broker to engage in a number of specialized activities, including the following:

- **Mortgage broker:** These brokers solicit borrowers and lenders for loans secured by real estate, and their activities are strictly regulated. (Under the federal Secure and Fair Enforcement Mortgage Licensing Act [SAFE Act], every state must have a system for licensing mortgage originators.)
- **Real property syndicate security dealer:** A real estate broker is exempt from the licensing requirements of the corporation's code and may sell both corporate and noncorporate syndicate interests.
- **Mineral, oil, and gas broker:** While MOG licenses are no longer being issued, a real estate licensee can engage in MOG transactions without additional licensing and without permits.

- Escrow agent: Real estate brokers can act as escrow agents in those transactions in which they represent either the buyer or seller or in which the broker is a principal to the transaction.
- Mobile home sales: With specified restrictions, a real estate licensee can engage in the sale of mobile homes.
- Advance fee rental agent: While there is a separate rental agent license, a real estate broker is exempt from the licensing requirement and may engage in a prepaid rental listing service.
- Business opportunity broker: A real estate licensee can engage in the sale of business opportunities.
- Franchise sales: A real estate licensee is authorized to sell franchise opportunities.

Real estate licensees must comply with all federal and state fair housing laws. These include the following:

- Civil Rights Act of 1866: Citizens of all races shall have the same rights as enjoyed by white citizens to inherit, purchase, lease, sell, or hold real and personal property.
- Civil Rights Act of 1968 (federal Fair Housing Act): This act prohibits discrimination in housing based on race, color, sex, religion, or national origin. A 1988 amendment extended its coverage to include familial status and disability.
- Unruh Civil Rights Act: This act prohibits discrimination by a business on the basis of race, color, religion, ancestry, national origin, age, sex, and sexual preference.
- Fair Employment and Housing Act (Rumford Act): This act prohibits discrimination based on race, color, religion, sex, marital status, national origin, or ancestry.
- Business and Professions Code: Provides for commissioner disciplinary action against licensees for discriminatory practices.

Because of overlapping coverage, a civil rights violation is likely to be a violation of several acts. The Omnibus Housing Nondiscrimination Act expands the protected categories of all California antidiscrimination acts to conform with the California Fair Employment and Housing Act.

DISCUSSION CASES

1. The plaintiff negotiated a lease and an option to extend the lease. The defendant agreed to pay the plaintiff \$7,500 if the option was exercised. Before the expiration of the lease period, and after the broker's license had lapsed, the lessor and the lessee agreed to a new option, and a new lease was entered into at terms different from those originally specified. **Is the former broker entitled to \$7,500?**

Cline v. Yamaga (1979) 97 C.A.3d 239

2. Katz, a broker, purchased a building that he knew had code violations and was subject to an order to demolish an illegal room. Katz advertised the property as a “fixer-upper” that would be sold “as is.” Katz asked the buyer’s broker if he knew there were code violations. The buyer’s broker mentioned he had noticed some. Katz did not inform the buyer’s broker of all the violations or of the city order to demolish the room. The purchaser later discovered the violations. Katz offered to rescind the sale but refused to pay for work already performed by the purchaser. **Was the Department of Real Estate justified in revoking Katz’s license?**

Katz v. Department of Real Estate (1979) 96 C.A.3d 895

3. During a marriage that lasted two months and was subsequently annulled because of fraud, a wife invested in a joint venture with her husband. The wife was defrauded in the joint venture and subsequently obtained a judgment against her former husband, who was a real estate broker. The judgment was uncollectible against the broker. **Is the former wife entitled to compensation from the Consumer Recovery Account?**

Powers v. Fox (1979) 96 C.A.3d 440

4. The recovery account, in determining what to pay, used a setoff of tax benefits received by an investor against the loss. **Was this action proper?**

Froid v. Fox (1982) 132 C.A.3d 832

5. A mortgage loan broker charged fees based on the maximum allowed by law. **Was this action proper?**

Pacific Plan of California v. Kinder (1978) 84 C.A.3d 215

6. A landlord had a minimum income policy for rentals. The requirement was a gross income at least three times greater than the rent. The plaintiff claimed that the policy arbitrarily discriminated against people with lower incomes, regardless of their actual ability to pay, and that it discriminated against women because of disparate earnings. **Does this income test violate the Unruh Act?**

Harris v. Capital Growth Investors XIV (1991) 52 C.3d 1142

7. The real estate commissioner denied a license on the grounds that the applicant had been convicted of distributing cocaine. **Was the action of the real estate commissioner proper?**

Brandt v. Fox (1979) 90 C.A.3d 737

8. The plaintiff was arrested after landing an airplane containing between 800 and 1,000 pounds of marijuana. He pleaded guilty to possession for the purpose of sale. **Was the commissioner’s action to revoke the plaintiff’s license proper?**

Golde v. Fox (1979) 98 C.A.3d 167

9. Pieri pleaded guilty to obtaining unemployment benefits by fraud. He was placed on probation, and the charge was dismissed at the end of the probationary period. Pieri’s

application for a broker's license three years later was denied because of a conviction for a crime involving moral turpitude. **Was the commissioner's action proper?**

Pieri v. Fox (1979) 96 C.A.3d 802

10. A landlord had a policy allowing two adults and two children to occupy an apartment only if the second child was born after the family had taken possession. **Is the landlord's policy proper?**

Smith v. Ring Bros. Management Corp. (1986) 183 C.A.3d 649

11. A real estate salesman falsely represented himself as a real estate broker to induce the plaintiff to invest in short-term loans secured by trust deeds. The salesperson took the money but did not invest in the trust deeds. After a judgment that could not be collected, the plaintiff asked for reimbursement from the recovery account. The commissioner took the position that the defendant was not licensed as a broker and so could not engage in the transactions; therefore, the account should not be liable. **Do you agree?**

Vinci v. Edmonds (1986) 185 C.A.3d 1251

12. **Is a creditor who has obtained a judgment entitled to recover from the recovery account when the broker's debt was discharged in bankruptcy?**

Armenta v. Edmonds (1988) 201 C.A.3d 464

13. The town of Huntington, New York, has about 200,000 residents, of which 95% are white and less than 4% are black. A private developer sought to change the zoning from single-family housing to multifamily rental to build a project fostering integration. The town refused to rezone. **Does the town's action violate the Civil Rights Act of 1968?**

Town of Huntington v. Huntington Branch, NAACP (1989) 488 U.S. 15

14. A mobile home park charged a per diem guest fee, as well as a parking fee, for a home health-care aide required for an infant with respiratory problems. **Is there any problem as to these fees?**

U.S. v. California Mobile Home Park Management Co. (1994) 29 F.3d 1413

15. The real estate commissioner automatically suspended the license of a broker who failed to reimburse the recovery fund. The broker alleged that due process was violated because he did not have a hearing. **Is the broker correct?**

Rodriguez v. Calif. Dept. of Real Estate (1997) 51 C.A.4th 1289

16. A title insurer paid a lender's claim after a mortgage broker embezzled the funds that were to pay off existing trust deeds. The title insurer then sued the broker and obtained a judgment that could not be collected. The title insurer then filed a claim with the California Department of Real Estate recovery fund. **Does the title insurer have a valid claim against the recovery fund?**

Stewart Title Guaranty Co. v. Park (2001) 250 F.3d 1249

17. Using a business visitor pass, Jankey frequently visited the Twentieth Century Fox film and production lot in Los Angeles. Because he was confined to a wheelchair, he was unable to access the commissary, studio store, or automatic teller machine. Jankey alleged violation of the Americans with Disabilities Act. **Was the act violated in this case?**

Jankey v. Twentieth Century Fox Film Corporation (2000) 212 F.3d 1159

18. A quadriplegic who was confined to a wheelchair was denied access to the California Center for the Arts in Escondido because of her small dog, who was able to retrieve small dropped items. The dog had barked during intermission at several prior concerts. **Was the refusal to allow the dog to attend events justified?**

Lentini v. California Center for the Arts, Escondido (2004) 370 F.3d 837

19. An investor renamed apartment buildings Korean World Towers, Wilshire Korean Towers, The Sterling Korean Plaza, Windsor Square Korean Towers, Fremont Place, Korean Plaza, and Hancock Asian Towers. While the buildings were near the Koreatown area of Los Angeles, the residents of these buildings were primarily African American.

It was alleged that the use of Korean in the names, as well as the Korean flag in their advertising, indicated a preference for Korean and Asian tenants. **Should the court grant a preliminary injunction against the use of “Korean” in the names of the buildings? Why?**

Housing Rights Center v. Donald Sterling Corp. (2003) 274 Fed. Supp. 2nd 1129

20. A “for sale by owner” internet listing service charged a flat fee for internet listings but not sales commissions. They were notified by the real estate commissioner that they must be represented by a California Real Estate Broker. **Do you agree with the commissioner?**

forsalebyowner.com Corporation v. Zinnemann (2005) 347 Fed. Supp. 2nd 868

21. A licensed broker who managed over 1,000 apartments pleaded guilty to three misdemeanor code violations. Before the guilty plea, he had been convicted of 50 code violations and had been disciplined by the State Bar. The DRE revoked the broker’s license, contending that the violations were done with the intent of financial gain. **Was the revocation proper?**

Robbins v. Davi (2009) 175 C.A. 4th 118

22. A jury determined that a broker had negligently misrepresented square footage of a home. The jury did not find that there was clear and convincing evidence that the broker acted fraudulently. The Department of Real Estate suspended the broker’s license based on the jury verdict of negligent misrepresentation. **Was the DRE suspension justified?**

The Grubb Co. Inc. v. Department of Real Estate (2011) 194 C.A. 4th 1494

INTERACTIVE FAIR HOUSING CASE STUDIES

Instructor: Select teams of two students for each situation. One student will be prepared to role-play the property manager, while the other student will act as the property owner or renter.

Situation 1: Tom Flynn applies for a rental. He is a single, middle-aged man who presents himself very well and is financially secure. Mr. Flynn likes the unit because it is across the street from a playground and he indicates he loves to watch children play. The four-family building has three young families with children as current tenants.

Tom Flynn has been in the newspapers lately because he was accused of child molestation. Despite strong evidence of his guilt, the district attorney declined to prosecute because the evidence was obtained without a proper search warrant.

As property manager, you wish to refuse the rental but decide to let the owner make the rental decision. Present your case to the owner considering the fair housing laws.

As an owner, you are anxious to rent the unit. The unit has been vacant for several months and you need the income. How do you respond to the property manager as to Tom Flynn?

Situation 2: You are a 75-year-old woman who owns a home with an accessory rental unit. The unit is vacant and you wish to find a tenant. You want a white single woman you can relate to. You contact a local rental agent for help in meeting your rental requirements. Explain your reasons for your rental criteria to the agent based upon your understanding of the federal fair housing legislation.

As rental agent, inform the owner how you must handle the rental considering both federal and California fair housing legislation.

Situation 3: A minister owns a large apartment complex and contacts your property management firm to handle rentals. He expresses several caveats. He wants Christian tenants and no alcoholics, drug addicts, or smokers.

As a prospective rental agent, can you agree to these covets? If not, what can you agree to?

As the minister owner, what agreement is possible?

Situation 4: One of your tenants is gay. While this is not a problem, the tenant flies a rainbow flag on the flagpole in front of his rental home. The owner tells you as property manager to inform the tenant to stop flying the flag.

As property manager, what should be your reaction to this request?

As the tenant, you are told that the owner would appreciate it if the flag were not flown. How could you respond?

UNIT QUIZ

1. A person would MOST likely contact the real estate commissioner to
 - a. resolve a salesperson/broker commission dispute.
 - b. report fraud of a licensee.
 - c. obtain an opinion of the legality of a course of action.
 - d. arbitrate disputes between brokers.
2. Which people would require a real estate license?
 - a. An attorney-in-fact selling property of another
 - b. An attorney-at-law taking a listing
 - c. A paid administrator of an estate selling the decedent's property
 - d. None of these
3. A broker for a corporation who also wants to conduct a separate brokerage business must
 - a. sell her corporate stock.
 - b. obtain a separate broker's license.
 - c. operate through another licensee.
 - d. return the corporate license to the commissioner.
4. A nonresident who wishes to obtain a California real estate license must
 - a. first establish California residency.
 - b. consent to process service on the secretary of state if the prospective licensee cannot be located within the state.
 - c. also be licensed in his state of residency.
 - d. be 21 years of age.
5. A three-hour course in ethics is required to be taken
 - a. before taking the real estate broker examination.
 - b. within 18 months of obtaining a salesperson's license.
 - c. before a salesperson's first license renewal.
 - d. for license renewals, but only after the first renewal for salespeople.
6. Which is NOT sufficient cause for the revocation of a real estate license?
 - a. Commingling of principal and personal funds
 - b. Acting for more than one party in a transaction
 - c. Making a substantial misrepresentation
 - d. Making any false promises of a character likely to influence, persuade, or induce

7. Which is *NOT* grounds for disciplinary action by the real estate commissioner?
 - a. Failure of an agent to disclose an ownership interest in property being sold
 - b. Failure to exercise reasonable supervision over the acts of salespeople
 - c. Violation of the Franchise Investment Law
 - d. Revealing to a buyer problems that make the property unsuited to his purpose
8. Broker Thomas, who was a member of the city planning commission, told his friend broker Jones that an area was to be rezoned from agricultural use to commercial use. Broker Thomas did not receive any consideration for this information. Broker Jones purchased several parcels in the area and made a profit when the zoning was changed. Which broker has placed his license in jeopardy?
 - a. Thomas
 - b. Jones
 - c. Both Thomas and Jones
 - d. Neither Thomas nor Jones
9. The maximum amount a person can obtain from a licensee after obtaining a judgment against the licensee for a fraudulent act is
 - a. \$20,000.
 - b. \$50,000 for each offense.
 - c. \$250,000.
 - d. the amount of the judgment.
10. Which activity requires a real estate license?
 - a. Being the resident manager of an apartment building
 - b. Selling more than eight parcels of one's own real estate in one year
 - c. Subdividing one's own property
 - d. Acting as a mortgage loan broker
11. A \$5,000 fee that a broker charged for negotiating a three-year second trust deed for \$20,000 is
 - a. usurious.
 - b. voidable.
 - c. illegal.
 - d. legal.
12. A broker's loan statement is prepared for the benefit of the
 - a. broker.
 - b. Bureau of Real Estate.
 - c. lender.
 - d. borrower.

13. In advertising a mobile home, a broker used “no down payment” in the ads because he had arranged a separate loan to cover the down payment. The advertising was
 - a. proper, because there was 100% financing.
 - b. expressly prohibited by law.
 - c. unethical but not illegal.
 - d. proper, if all loan terms were included in the ad.
14. In selling mobile homes, a real estate broker may *NOT*
 - a. have an office where six model homes are displayed.
 - b. advertise “no down payment” if the payment is to be borrowed.
 - c. fail to withdraw advertising within 48 hours of receipt of notice of nonavailability.
 - d. do any of these.
15. After collecting an advance rental fee of \$75, you are unable to provide your client with a rental that suits her. When she requests a refund, upon expiration of her rental contract, you must return
 - a. nothing, if you provided a list of at least three rentals.
 - b. \$50.
 - c. \$25.
 - d. \$40.
16. Which of the following is *NOT* required to be included in the notice required under the Bulk Sales Act?
 - a. Name of seller
 - b. Date and place of sale
 - c. Sales price and terms
 - d. All of these
17. In cases of noncompliance with the Bulk Sales Act, the party likely to be *MOST* adversely affected would be the
 - a. seller.
 - b. purchaser.
 - c. creditors of the seller.
 - d. Franchise Tax Board.
18. As a licensee dealing with people of other races, you should
 - a. suggest that they could be better served by dealing with agents of their own race.
 - b. be frank and honest in explaining the problems of locating in areas having few people of their race.
 - c. be proper and helpful, even though you would prefer they seek help elsewhere.
 - d. be completely “color-blind” regarding race.

19. The federal case that upheld fair housing was
 - a. *Jones v. Mayer*.
 - b. *Brown v. Board of Education*.
 - c. *Shelley v. Kraemer*.
 - d. *Wellenkamp v. Bank of America*.

20. A nonprofit women's organization intends to develop housing for members. It will limit rentals to women and will give preference to unmarried mothers. This action would likely be a violation of the
 - a. Civil Rights Act of 1866.
 - b. Civil Rights Act of 1968.
 - c. Rumford Act.
 - d. both b and c.

21. The Civil Rights Act of 1968, as amended, does NOT prohibit
 - a. sex discrimination.
 - b. age discrimination.
 - c. housing reserved for the elderly.
 - d. discrimination against people with disabilities.

22. A broker takes listings in an area where property values are going down because the neighborhood is changing, and there is a mass exodus of whites. Which of the following actions by the broker would be a violation of fair housing laws?
 - a. Advertising "Sell your property fast before you lose equity"
 - b. Offering whites a lower commission rate to sell their property
 - c. Both of these
 - d. Neither of these

23. Which of the following is an example of steering?
 - a. Directing whites away from mixed-race areas
 - b. Advertising properties in black areas only in newspapers aimed at black readers
 - c. Both of these
 - d. Neither of these

24. Refusal to make a mortgage loan within a designated area is known as
 - a. steering.
 - b. redlining.
 - c. blockbusting.
 - d. none of these.

25. For a broker's violation of the Civil Rights Act of 1968, the courts would *NOT*
- a. issue a restraining order.
 - b. award actual damages.
 - c. award punitive damages.
 - d. revoke or suspend the broker's license.

5

UNIT FIVE



LAW OF CONTRACTS

KEY TERMS

accord and satisfaction
anticipatory breach
assignment of contract
bilateral contract
breach of contract
commercial frustration
contract of adhesion
divisible contract
duress
emancipated minor
estoppel
executed contract
executory contract

express contract
illusory contract
implied contract
judgment
laches
liquidated damages
menace
novation
option
parol evidence rule
quasi contract
right of first refusal
seals

statute of frauds
third-party beneficiary
time is of the essence
undue influence
Uniform Electronic
Transactions Act
(UETA)
unilateral contract
valid contract
voidable contract
void contract
waiver

TYPES OF CONTRACTS

A contract is an agreement between two or more parties to do or not to do something. Valid contracts are generally enforceable under the law.

Express vs. Implied

Contracts are either express or implied. An **express contract** is an agreement stated in words. The terms of the agreement may be set forth either orally or in writing. An agreement whereby a buyer agrees to buy and a seller agrees to sell a property at an agreed-on price and terms would be an express contract. Later in this unit, you will learn why most real estate contracts must be express contracts.

An **implied contract** is an agreement that, while not specifically stated, is understood by the parties. Section 1621 of the Civil Code states, “An implied contract is one, the existence and terms of which are manifested by conduct.” For example, assume that you ask a pest control firm to make a termite inspection of a property. While you never agreed to pay a particular amount, or even any amount, for the termite inspection, a reasonable person would understand that the pest control firm will expect to be paid for its services. The party ordering the report should expect to be charged for the work, and the party performing the work should expect to be paid. Therefore, an implied contract to pay the reasonable value of the services rendered exists.

Quasi Contract

In a **quasi contract**, no real contractual intent exists. The law implies the existence of a contract. The law often will imply a contract when one party benefited but did not really consent to any agreement. For example, suppose by mistake your neighbor paid the real estate taxes on your property. You would be obligated, as a matter of equity or fairness, in a quasi contract to reimburse your neighbor for the amount of taxes paid for your benefit.

Bilateral vs. Unilateral

Contracts may be bilateral or unilateral agreements. A **bilateral contract** is an agreement in which a mutual exchange of promises occurs—a promise for a promise. If a pest control firm offered to provide a termite inspection for a property at a stated price and you agreed to have it performed at the price stated, you would have formed a bilateral contract. This is an example of an express (stated) bilateral contract.

Offers to purchase real estate, when accepted, form bilateral contracts. The buyer, who is usually the *offeror*, agrees to buy at a specified price and terms, and the seller, usually the *offeree*, agrees to sell at that price and those terms.

Exclusive right-to-sell listings are bilateral contracts. The owners promise to pay a fee to the broker if the broker obtains a ready, willing, and able buyer according to the terms of the listing or any other terms the sellers are willing to accept. In exchange, the broker promises to use diligence to obtain a buyer.

A **unilateral contract** is a promise for an act; one party makes a promise to induce another party to act. The second party (offeree) is not bound to act, but if the offeree accepts the offer by performing the requested act, a binding contract is formed. For example, suppose you offered to pay a painter \$800 if he would repair the stucco on your garage and paint the exterior with two coats of paint. The painter would not be obligated to perform because you cannot bind another party to a contract without that party’s assent. However, if the painter were to repair the stucco and paint the garage as requested, he would have accepted your offer by his performance and would be entitled to be paid as agreed.

An open (nonexclusive) listing is a unilateral contract. Under an open listing, an owner promises to pay a broker should the broker succeed in procuring a buyer. The broker is under no obligation to use diligence to look for a buyer, but if the broker does procure a buyer, the broker would, by performance, be accepting the offer. If the listing required that

a broker use due diligence to seek a buyer, it would be a bilateral contract (promise for a promise) and not an open listing (promise for an act).

Executory vs. Executed

A contract is either executory or executed. An **executory contract** is one that has not yet been fully performed. An agreement between a buyer and a seller for the sale of land would be executory until escrow was closed. The agreement would be executory until title was transferred and the consideration was paid.

An **executed contract** is one in which everything that was required to be performed has been performed. After escrow closes on a sales agreement, the contract becomes an executed one. (Do not confuse an executed contract with the execution of a document, which is the signing of the document.)

ESSENTIALS OF A VALID CONTRACT

For a **valid contract** to exist, four elements are necessary:

1. Competent parties
2. Mutual consent
3. Legal purpose
4. Consideration

Valid contracts generally are enforceable. Exceptions are contracts outlawed by the statute of limitations or discharged in bankruptcy, which, while valid agreements, are nevertheless unenforceable.

Some contracts must be in writing and signed by the person who will be liable for performance of obligation. Under the real estate law, electronic signatures are now enforceable.

Competent Parties

A minor is anyone under the age of 18. Contracts for the purchase or sale of real property entered into by unemancipated minors are void. A void contract is the same as having no agreement at all because the agreement does not bind either of the parties to it. (For information about void contracts, refer to “Void and Voidable Contracts” later in this section.) A minor can contract only for necessities—items required for support, such as food and clothing.

Most contracts by minors for other than necessities are subject to disaffirmance (annulment) by the minor within a reasonable time after reaching the age of 18. In California, only the former minor has this right to disaffirm and not the person with whom the minor contracted. A minor who claimed to be of contractual age is not prevented from disaffirming the contract. Therefore, parties who deal with individuals who could be minors have a duty to ascertain the status of the person they are dealing with.

After reaching the age of 18, a person can ratify contracts made as a minor so that the contracts no longer can be disaffirmed. After the age of 18, any action indicating that the person intended to be bound—payment on a property, repairing, altering, renting, or offering the property for sale—would be a ratification.

An **emancipated minor** is an exception to the general rule that minors cannot contract for other than necessities. Emancipated minors can contract as adults and cannot disaffirm their contracts. Minors can be emancipated if they

- are married or unmarried (widowed or divorced),
- enter military service on active duty, or
- receive a declaration of emancipation from the court (Civil Code Section 62).

If a broker arranges a sale to a minor and the minor later disaffirms the purchase agreement, the minor could be entitled to the return of consideration paid to the seller. The broker could be liable to the seller for the damages suffered.

A person adjudged insane cannot contract. Any contract entered into would be void. The same holds true for people not adjudged insane but who are wholly without understanding. Both minors and incompetents can, however, convey, mortgage, lease, or acquire real property following a superior court order obtained through appropriate guardianship or conservatorship proceedings.

People who are of unsound mind but not wholly without understanding and who have not been adjudged insane can void contracts they entered into. These contracts are valid unless voided. After regaining sanity, a person can ratify or disaffirm a contract made while of unsound mind.

A person of unsound mind who has not been adjudged insane and who has lucid periods could enter into a binding contract during a lucid period.

A person who is under the influence of alcohol and/or drugs and as a result is wholly without understanding cannot contract. However, merely being under the influence of alcohol and/or drugs generally is not sufficient by itself to void a contract.

People sentenced to imprisonment in state prisons are deprived of their civil rights to the extent necessary for the security of the institution in which they are confined and for the reasonable protection of the public. Convicts do not forfeit their property. They may acquire property by gift, inheritance, or will under certain conditions, and they may convey their property or acquire property through conveyance. The Department of Corrections may restrict conveyances made for business purposes.

Aliens have contractual capacity in California.

Mutual Consent

The existence of a meeting of the minds is decided by the courts based on how a reasonable person would view the words and actions of the parties. Therefore, a secret intent of a different performance by a party would have no effect.

An offer and acceptance that indicate a meeting of the minds on a definite and certain agreement usually are considered evidence of mutual consent.

The offer The offer must be a clear and definite offer made with the intent that when it is accepted, there will be a binding agreement.

A letter of intent is a nonbinding expression of interest. Even though definite terms may be expressed, it is not an offer. Breach of a letter of intent would not entitle the other party to damages.

Acceptance A contract is formed when the offeree (person to whom a definite and certain offer is made) accepts the offer of the offeror (person making the offer). An offer can specify the manner of acceptance, but if no form for acceptance is specified, the offer can be accepted in any reasonable manner.

In the case of *Hofer v. Young* (1995) 38 C.A.4th 52, the court held that a FAX is “a reasonable and increasingly common means of modern communication.” While acceptance may be by FAX, unless the offer prescribes the means of acceptance, records should be kept to prove that the FAX was sent as well as the time it was received.

Professional Publishing Corporation’s Standard Residential Purchase Agreement provides that a document is to be considered delivered at the time the FAX is transmitted, provided a transmission report is generated reflecting the accurate transmission of the document.

Acceptance is possible by email because email is “a reasonable and increasingly common means of modern communication.” Pads are available that allow signatures to be electronically attached to documents. A person can scan documents and send them by email as long as that person can show the original signed document. California is one of 49 states that have passed the **Uniform Electronic Transactions Act** that gives legal recognition to electronic signatures in business transactions.

At an auction, the people who are bidding are the offerors. They make their bids to the auctioneer, who is the offeree. The auctioneer does not have to accept any offer unless the auction is being conducted *without reserve*, which means the seller has agreed in advance that the highest bid will be accepted. A bidder at a real estate auction that is not held “without reserve” should realize that the high bid does not mean the bidder has made a purchase unless the bid is accepted.

Acceptance takes place when the offeree notifies the offeror or the offeror’s agent of the acceptance. Communicating acceptance to a third party who is not an agent of the offeror is not an acceptance. At an auction, the fall of the auctioneer’s hammer signifies acceptance and is considered notification to the bidder. The act of mailing a written acceptance constitutes notification (effective upon posting, Civil Code 1583). Because it might become necessary to prove mailing, a postal receipt is desirable.

CASE STUDY In the case of *Gibbs v. American Savings* (1990) 217 C.A.3d 1372, the buyers gave their acceptance of a seller's counteroffer to a company mail clerk at 10 a.m. The mail clerk failed to take it promptly to the post office. At 11 a.m., the seller called to revoke the counteroffer. The buyers sued the seller for damages and specific performance. The court held that a contract would have been formed if the acceptance had been deposited in the U.S. Mail beyond the buyers' further control, but in this case, a contract had not been formed because the acceptance had not been mailed.

The acceptance must be made by the offeree. A third person who has knowledge of an offer to sell cannot, by acceptance, form a binding contract because the offer was not made to that party.

Silence to an offer generally is regarded as neither acceptance nor rejection. Even if an offer states, "Failure to reply within 10 days will be considered acceptance," failure to reply will not in fact be acceptance of the offer. Only if the parties by their prior dealings have established silence as acceptance might silence be construed as acceptance.

Intent to enter into a contract must be present. Acceptance of an offer obviously made in jest will not form a binding agreement.

Newspaper advertisements of real estate are not offers to sell; they are merely invitations to negotiate. A buyer's acceptance does not form a binding contract because newspaper advertisements are really announcements that the property is being placed on the market. Therefore, a buyer cannot accept an "offer" made in an ad. Similarly, providing information to a multiple listing service is an invitation to negotiate only and not an offer to sell.

If an offer fails to state how long it will remain open for acceptance, it can be accepted within a reasonable period of time. Even if the offer does state a period for acceptance, courts often will allow acceptance after that period unless the offer indicates that time is critical, usually accomplished by including the words "**time is of the essence.**"

Although several cases have held that a "time is of the essence" clause does not always make time essential in a contract (*Nash v. Superior Court* (1978) 86 C.A.3d 690), these decisions have applied to contractual performance and not to the period for acceptance of an offer.

Counteroffer An acceptance that varies from the offer is not an acceptance but a counteroffer. A counteroffer is, in fact, a rejection of the original offer. Assume an offer calls for a 90-day escrow. An acceptance that states, "Accepted provided the escrow period be 30 days," represents a material change in the offer. The offeror really is making a counteroffer and rejecting the original offer. After such rejection, the offeree no longer can form a binding contract by later accepting the original offer.

In a counteroffer, the offeree becomes the new offeror. The original offeror is now the offeree and can accept the counteroffer and form a binding contract, reject it, or make a new counteroffer.

A request for a change in the proposed contract that does not condition the acceptance is not a counteroffer. For example, in an accepted offer that has the notation, “It would be appreciated if escrow could be closed before December 30,” the acceptance forms a binding contract because acceptance is not conditioned on this request. That is, the offeror is not bound to the December 30 date.

CASE STUDY The case of *Roth v. Malson* (1998) 67 C.A.4th 552 involved an acreage parcel that was listed for sale at \$47,600. A buyer offered \$41,650 cash and a close of escrow within 30 days of acceptance. The seller made a counteroffer of \$44,000. The buyer signed and dated the counter-to-counteroffer portion of the counteroffer form and wrote, “Price to be \$44,000 as above. Escrow to close on or before December 6, 1995. All cash.”

Subsequently, the seller notified the buyer that the property was being withdrawn from the market. The buyer then sued for specific performance. The superior court granted judgment for seller Malson, concluding that no sale contract was ever formed.

The Court of Appeal affirmed because Roth, the buyer, failed to accept the counteroffer. Civil Code 1585 requires that an acceptance must be “absolute and unqualified.” The buyer changed the close of escrow from “within 30 days of acceptance” to “on or before December 6th.” This was a counter to the seller’s counteroffer requiring the seller’s acceptance.

Revocation Before notification of acceptance, an offeror can withdraw the offer. This generally is true even if the offeror promised to keep the offer open for a specified period. Unless consideration is given to keep an offer open (this would be an option), the offer generally can be revoked. One exception is that the offeror can no longer revoke the offer after performance has started on a unilateral contract.

Revocation must be made to the offeree or the offeree’s agent to be effective.

Revocation takes place upon receipt, so contrary to an acceptance, mailing a revocation has no effect until it is received. Assume a revocation was mailed on the first of the month and the offeree mailed an acceptance on the third of the month. The revocation was received on the fourth of the month, and the acceptance was received on the fifth of the month. A valid contract would result because acceptance took place on the third (upon mailing), and the revocation had no effect because it was not effective (received) until after the offer was accepted.

CASE STUDY The case of *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 C.A.4th 613 involved a firm that had negotiated simultaneously with two different buyers. It communicated to its broker that it was withdrawing the counteroffer it had made to one of the buyers. However, the broker did not communicate the revocation to the buyer. The court found that while the property owner had communicated revocation of its counteroffer to the broker before the counteroffer was accepted, the broker was not acting as the buyer's agent and had not communicated the revocation to the buyer. Accordingly, the buyer's acceptance of the seller's counteroffer constituted a contract. The seller sold the same property twice and was liable to Ersa Grae Corporation for nondelivery damages.

When an offeror dies or becomes mentally incapacitated before acceptance, the offer is dead, and a later acceptance will not form a binding contract. When the offeror is a corporation, the death of the officer making the offer will not affect the offer, because the corporation is a separate legal entity and does not die with the death of its officers.

Unless a contract calls for personal services, death or mental incapacity after acceptance will not affect a contract. The contract will bind the heirs or estates.

The destruction of the subject matter terminates an offer. If a house is destroyed by fire before acceptance of an offer, acceptance by the seller after the destruction will not form a binding contract.

When the acceptor fails to fulfill a condition precedent to acceptance, such as verifying gross or net income within a stated period of time, the offer is revoked.

Definiteness An agreement must be definite. An agreement to buy "the house on Third Street" probably would be definite enough if the seller owned only one house on Third Street. However, if the seller owned several houses on Third Street, the agreement might not be binding.

CASE STUDY In the case of *Sterling v. Taylor* (2007) 40 C.A. 4th 757, Sterling and Taylor drafted a handwritten memorandum entitled "Contract for Sale of Real Property." The contract stated, "approx. 10.468 × gross income. Estimated income \$1,600,000, Price \$16,750.00." While Sterling dated and initialed the memorandum as "buyer," the seller space was left blank. Later, Sterling wrote Taylor confirming the contract of sale and Taylor signed the letter "agreed, accepted, and approved." The price was a clerical error and should have read \$16,750,000.

Sterling determined the actual income was \$1,375,404, not \$1,600,000 as estimated and wanted the sales price lowered to \$14,404,841 based on actual rents and the 10.468 multiplier. Taylor refused and Sterling sued.

The trial court granted the defendant's motion for summary judgment based on the fact that, under the statute of frauds, the terms were too uncertain to be enforced. The Court of Appeal reversed, ruling that while price was ambiguous, it could be clarified by extrinsic evidence.

The Supreme Court reversed, ruling that the terms were unclear. While Sterling claimed that "approx" applied to the total price not the multiplier and the missing zero was a simple error, the extrinsic evidence was at odds with the memorandum. The memorandum did not indicate the parties contemplated any change to the price based on actual income.

Note: While Sterling and Taylor are mega-real estate investors who are sophisticated as to contracts, it is unusual that a deal of this magnitude should be made without consultation with real estate attorneys.

Agreement to buy a property at "a price to be agreed on" would not be binding because it would lack definitiveness. An agreement to buy real estate at a price to be determined by a definite formula would be binding, even though the exact price is not known at the time the agreement is entered into. For example, an agreement to buy at the average appraisal price of three named appraisers could be binding.

The case of *Goodyear Rubber Corporation v. Munoz* (1985) 170 C.A.3d 919 held that an option to buy at "fair market value" was valid. However, the case of *ETCO Corporation v. Hauer* (1984) 161 C.A.3d 1154 held that a lease at a rent to be mutually agreed upon rendered the option unenforceable.

When a purchase is subject to the purchaser's or seller's later decision about whether to complete the transaction, the contract is an **illusory contract**, and neither party is bound. "I will pay you \$100,000 for the lot if I decide to buy it" is not an agreement. Prospective tenants often sign letters of intent that indicate they will seriously negotiate with the owner for space. While letters of intent from quality tenants might influence a construction lender, they are not valid contracts. Again, these are illusory contracts and are agreements only that the parties will attempt to agree.

"Subject to" provisions do not make a contract illusory. Offers are frequently written subject to zoning changes, appraisals, financing, and other contingencies.

Requirements that work is to be performed to a person's satisfaction have been held to mean that dissatisfaction must be exercised in good faith and not merely to break the agreement.

For a contract to be valid, the parties not only must be identified but also must exist. Parties may use fictitious names or pseudonyms, but they must be real people or business entities. An agreement by an entity that does not exist, such as a nonexistent corporation, would not be enforceable. However, the parties can agree that a party will be designated later to perform or to receive performance, as in naming a designee to receive the deed.

The manner and time of payment do not have to be specified in the contract. Payment in cash at the time of closing is implied unless specified otherwise. When a closing date is not specified in an agreement, a closing within a reasonable period is implied. Similarly, in the absence of a stated time for possession to be given to the buyer, it is implied that possession will transfer upon close of escrow.

Also implied is that the seller will convey marketable title and that any work to be performed will be performed in a workmanlike manner.

Mistakes A contract can be voided on the basis of a mutual mistake as to fact. For example, if both buyer and seller believed that a trust deed was assumable but discovered that it was not after the sales agreement had been signed, the buyer would be able to void the agreement because of the mutual mistake.

A unilateral mistake, in contrast, will not be the basis for voiding a contract. In the preceding example, if only the purchaser believed that the loan was assumable and the seller was unaware of the buyer's intent to assume the loan and had done nothing to warrant the buyer's belief, the contract would be enforceable.

CASE STUDY In the case of *Levy v. Wolff* (1956) 46 C.2d 367, a buyer paid \$16,500 for a parcel of land that both the buyer and the seller believed to be subject to a valid lease. Subsequent to the sale, the tenant brought an action that resulted in a court determination that the lease "had never been binding or in force." The court held that the mutual mistake as to fact would allow rescission. In this case, the purchaser wanted to keep the land, so the court allowed the purchaser to recover damages (the difference between the value of the land with the lease and the value without the lease).

A party who realizes that the other party is mistaken cannot take advantage and hold the mistaken party to the agreement. This is an exception to the rule that a unilateral mistake is not grounds to void a contract.

Legal Purpose

If parties enter into a contract in violation of the law, they generally cannot ask for enforcement of the agreement. A lease of premises for a specified illegal purpose, for example, could not be enforced by the lessor or the lessee.

Neither party can enforce an illegal executory contract. If executed, either party can rescind the agreement because of its illegal purpose.

A change in the law that results in an agreement becoming illegal voids a contract. It also revokes an unaccepted offer.

If an illegality is minor or not related directly to the agreement, the courts ordinarily will allow enforcement. For example, a masonry contractor who builds a proper block wall with building permits and in accordance with the contractual specifications will not be barred

from collecting the value of his work because a business permit in the community where the wall was constructed has expired or because he paid a laborer less than minimum wage.

Where the law was intended to protect a party from a wrongdoer, the law cannot be used to protect the wrongdoer. A broker who sold an unregistered real property security would be liable to the purchaser for any misrepresentations even though the sale violated the law because the registration requirement was intended to protect purchasers of securities, not sellers.

When one party is less guilty than the other, the less-guilty party might be able to recover. This is especially true if the other person has a greater knowledge of the law and represents the agreement as being legal.

If a contract is composed of several **divisible contracts**, the illegality of one part will not void the balance of the agreement. For example, assume a lease agreement covered several properties with separate rents. If one of the leases provided for a percentage of the gross from a specified illegal activity, that portion would be unenforceable, but the rest of the contract could be enforceable.

When an agreement is subject to two interpretations, one that is lawful and another that is illegal, in the absence of other evidence as to intent, the court will determine that the agreement should be given the legal interpretation.

Contracts that unreasonably restrain a person from engaging in business are against public policy and are unenforceable. In the sale of a barbershop, an agreement that the seller never will open another barbershop anywhere would be unenforceable because it is too severe a restraint. An agreement that the seller would not open another shop within a 5-mile radius of the shop for a period of three years, however, probably would be considered reasonable and therefore enforceable.

An agreement between a real estate salesperson and a broker that the salesperson would never become a broker or work for any other broker would not only be against public policy but also would likely be in violation of antitrust legislation.

Consideration

Consideration is anything of value given in exchange for a promise or performance of another. Consideration could be forbearance from acting, as well as a promise to act. For example, a creditor's agreeing not to start foreclosure for 90 days, when the creditor was entitled to foreclose, would be consideration for the transfer of other property.

A promise unsupported by consideration generally is considered unenforceable. It is merely a promise to make a gift. While an enforceable promise requires consideration, an executed transfer requires no consideration. Such a transfer is a completed gift.

The reason that an offeror can withdraw an offer anytime before acceptance is that an offer is unsupported by consideration. On the other hand, the presence of consideration requires that the offeror keep the offer open. In an option, the optionor receives consideration from the optionee so that the offer cannot be withdrawn.

Courts ordinarily will not get involved in evaluating the adequacy of consideration. The courts will, however, consider the amount of consideration when a party claims fraud, undue influence, or a mutual mistake as to a material fact. If a court determines that a contract is so unfair as to be unconscionable, the court may refuse to enforce it and allow the injured party to rescind the agreement or provide the injured party with other appropriate relief.

In cases involving specific performance, adequacy of consideration is essential. Without fair consideration, specific performance cannot be enforced (Civil Code Section 3391). (Specific performance, as stated in Unit 1, is an equitable remedy. Therefore, unless the consideration is fair, this equitable remedy will be denied.)

A third party can enforce a contract even when that third party did not pay consideration: “A contract made expressly for the benefit of a third party may be enforced by him at any time before the parties thereto rescind it” (Civil Code Section 1559). For example, Alfred agreed to build a shed for Baker. Assume that Alfred then paid Charley to build the shed. If Charley failed to perform, then Baker, who is a third-party beneficiary of the contract between Alfred and Charley, could enforce the contract.

Past consideration cannot be used as consideration to enforce a present promise in excess of the promisor’s duty. For example, a past gift given freely will not be consideration for a new promise, because the promisor was under no obligation or duty to act, forbear to act, or make any promise.

The promise to honor an existing obligation or to pay a just debt also is not consideration for a new promise. However, an agreement to pay a debt before it is due or after it was uncollectible or discharged in bankruptcy will be consideration for a new promise.

VOID AND VOIDABLE CONTRACTS

A *void contract* is one that never had any legal existence or effect. A void contract cannot be enforced. It is treated as if it were never made. A contract that lacks one of the four required contractual elements is void.

A *voidable contract* is a valid contract unless or until voided. What this means is that a wronged party has the right or election to void the contract or let it stand as an enforceable agreement against the wrongdoer.

Fraud

Fraud is an intentional misrepresentation of fact by words, conduct, or concealment that is intended to deceive another to act to their detriment and that does in fact so deceive the other party. Making false statements without knowing whether they are true also could be considered fraud.

To make a contract voidable, the fraud must have been material; that is, it must induce a party to contract. When one party knows that the other party is lying, fraud does not exist because the party who was lied to did not rely on the false statements in contracting.

A statement made in a contract that the parties are not relying on any oral statements or promises does not relieve the parties of responsibility for fraud.

Only the injured party can cancel the contract for fraud. Failure to void the contract within a reasonable period after learning of the fraud could be regarded as affirmation of the agreement.

A seller can be liable for failure to disclose the buyer's fraud to a third party.

CASE STUDY The case of *U.S. v. Cloud* (1989) 872 F.2d 846 involved the sale of the Cal-Neva Lodge by Cloud. The sales price was \$17 million. At a pre-closing conference, Cloud discovered that the escrow agreement indicated a \$27.5 million price and showed \$7.5 million had been paid outside of escrow. The figures had been inflated so that the buyer could obtain a \$20 million loan.

Cloud did not tell the escrow officers of the fraud but did insist that the escrow instructions reflect he was netting only \$17 million from the loan. The lender eventually lost more than \$24.5 million because of this loan. Cloud appealed his conviction for bank fraud and conspiracy. The Court of Appeal upheld the conviction because Cloud knew that the sales price was inflated and that he had not received money outside of escrow. His amendment to the escrow instructions did not exonerate him. In fact, it indicated that he fully understood and knowingly agreed to be part of a fraudulent scheme that was a conspiracy.

Misrepresentation

Misrepresentation is a civil wrong that differs from criminal fraud in that it is not intentional. While there are no criminal penalties for misrepresentation, it, like criminal fraud, makes a contract voidable and may induce civil damages.

People who honestly believed that their false assertions of fact were true but had no reasonable grounds for this belief will have committed the tort of negligent misrepresentation.

Duress and Menace

Duress generally is regarded as force. The wrongful confinement of a person or detention of property is duress. **Menace** is the threat of (1) confinement of a person, (2) detention of property, or (3) injury to the person, property, or character of another. A contract made under duress or menace makes the contract voidable at the election of the injured party.

Undue Influence

Undue influence is improper persuasion based on the relationship of the parties whereby one party is really not acting with free will. An example might be a nephew's persuading an elderly uncle to transfer property to him for a token consideration. Contracts entered into because of undue influence are voidable.

OPTIONS TO CONTRACT

An **option** is a contract to make a contract. The optionor (the owner) gives the optionee (potential purchaser or lessee) the right to buy or lease the property during a stated period for a specified price and terms.

An option is a contract and as such requires consideration be given to the optionor. The consideration must actually change hands. Reciting “in consideration of \$1 and other good and valuable consideration” is not sufficient.

If the option to buy is part of a lease agreement, part of the rent would suffice as consideration for the option. Because consideration is present, the optionor cannot revoke the option after it has been given. However, if the purchase price was not adequate, a court would not grant the optionee the remedy of specific performance. (Further discussion of options is included in Unit 6.)

Right of First Refusal

A **right of first refusal** differs from an option in that the prospective buyer is not given the absolute right to purchase but only the right to match an offer from a third party. A right generally is given to buy only if the owner decides to sell. Before the owner can sell, the owner must offer the property to the holder of the right of first refusal at the price and terms that the owner wishes to accept from a buyer. The holder of the right of first refusal loses that right if the holder does not meet the price and terms of the offer within a certain period.

A tenant with a right of first refusal might have difficulty exercising that right when consideration offered by another buyer is other than cash.

CASE STUDY In the case of *Ellis v. Chevron U.S.A., Inc.* (1988) 201 C.A.3d 132, Chevron’s lease gave it the right of first refusal as to lease proposals made by third parties when its own lease expired. Ellis, the owner, received a lease offer of \$3,000 a month; the lessee was to construct a new building on the site, acquire the adjacent site, and give Ellis the right to buy the adjacent site at the end of the lease. Chevron offered to meet the rent but took the position that it had no need for a new building or the adjacent site, and so these provisions should not be included. The Court of Appeal held that Chevron’s right of first refusal was set forth in a lease it had prepared, and therefore any ambiguities should be resolved against Chevron. Chevron claimed that an implied covenant of good faith and fair dealings restricted the term of offers that Ellis could entertain. The court, however, held that as long as a landlord solicited reasonable offers, the covenant was not breached.

INTERPRETATION OF CONTRACTS

Courts ordinarily will try to interpret contracts in accordance with the intent of the parties. Words will be given the general meaning they hold within the trade or profession involved.

In the event of an ambiguity, the courts generally will resolve the ambiguity against the party drafting the instrument if it was not drafted as a mutual effort.

CASE STUDY The case of *Wilson v. Gentile* (1992) 8 C.A.4th 759 involved a lease option that provided for the exercise of the option “within thirty (30) days before the expiration of this option.” Seven days before the expiration of the option, the optionee notified the optionor in writing of the exercise of the option. The optionor claimed the language required that the option be exercised at least 30 days before lease expiration. The Court of Appeal ruled that while the optionor may have had another intent, there was no ambiguity. The clause had to be interpreted in accordance with its plain meaning. The wording meant that there was a beginning date and an ending date to exercise the option.

Note: The optionor sued the real estate broker who drafted the clause. If the owner intended that the option be exercised only up to a specified date (30 days before the expiration of the lease), that should have been stated clearly. Precise drafting of legal instruments can be critical. This case points out the need for legal review.

If printed numerals differ from the words, the words generally will govern. So if a contract provided for monthly payments of “Four hundred dollars (\$40.00),” the monthly payment will be \$400.

In an ambiguity involving something added in typewriting to a printed form, the typewritten addition governs. If the ambiguity involves a handwritten portion, handwriting takes precedence over the printed or typed portions because it more clearly indicates intent.

Typographical errors ordinarily can be disregarded. See the case of *Gutzle Assocs. v. Switer* (1989) 215 C.A.3d 1636.

If conflicting agreements are present, the last one in time generally governs because it indicates the final intent of the parties. For example, if a purchase agreement and later-signed escrow instructions differ, the escrow instructions generally will govern. Because they were signed later, they more clearly indicate the final intent of the parties.

DISCHARGE OF CONTRACTS

Impossibility of Performance

A party is excused from performance because of impossibility. For example, a property manager who has a long-term contract to manage a structure that is now being taken by the city under eminent domain will be excused from performing for the remainder of the term.

Commercial Frustration

Performance will be excused in cases where the court determines that commercial frustration is present. That is, performance is not impossible but has become impractical because of an unforeseen occurrence. The nonoccurrence of the event or act actually was an implied condition of the contract. The doctrine of commercial frustration does not apply to situations in which the event reasonably could have been foreseen.

An example of commercial frustration would be a lease that allowed the premises to be used only for the sale of new automobiles. If a war resulted in new automobiles not being available, the courts probably would allow the lessee out of the lease because of commercial frustration.

Unconscionable Contracts

Courts will refuse to enforce contracts that are so grossly unfair that they offend public conscience. As an example, assume a property was in danger because of a flood and the person owning the only available pump wanted \$1,000 per hour for the use of the pump when \$50 a day was the normal rental. Even though a property owner agreed to the charge, a court would likely refuse to enforce the agreement as written.

A contract that does not allow a person to modify the agreement (take it or leave it) is considered a **contract of adhesion**. An example of such a contract would be a standard loan agreement used by all banks. If such a contract takes unreasonable advantage of the party who did not prepare it, courts will refuse to enforce the provision against that party.

CASE STUDY *Jaramillo v. JH Real Estate Partners, Inc.* (2003) 3 Cal. Rptr.3d 525 involved a residential lease clause that required binding arbitration of any disputes, with the parties equally sharing in the advance payment of arbitration fees for a three-arbitrator panel. The plaintiffs argued that the arbitration clause was unconscionable because it was an undue economic burden and that the clause was unenforceable because it was a contract of adhesion. The defendant appealed from a superior court ruling that the arbitrations clause was unenforceable.

The Court of Appeal affirmed, ruling that the clause was unconscionable and lacked mutuality because this was a contract of adhesion where the tenant had no bargaining power.

Note: See *Flores v. Transamerica Home First Inc.* (2001) 93 C.A.4th 846. In this case, the court ruled that a mandatory arbitration clause in a reverse mortgage is unconscionable and unenforceable by the lender as a contract of adhesion due to lack of bilateralism.

Breach of Contract

Most contracts end with performance according to their terms. However, some contracts are breached. A breach of contract is a failure to perform a contractual provision as agreed.

A party does not have to wait to start legal action until an actual breach has occurred if there has been an **anticipatory breach**. Examples of anticipatory breaches are

- renunciation of the agreement by the other party and
- an act that would make performance impossible, such as the seller conveying title to another before a scheduled close of escrow.

Often, parties will look for ways to get out of contracts that are disadvantageous. If they disavow the contract by treating an action of the other party as a contractual breach when it was not such a breach, they might be guilty of breaching the contract themselves.

Generally, the only party with a standing to sue for damages would be the injured contracting party. There is an exception in that a **third-party beneficiary** can sue for equitable or monetary remedy. A third-party beneficiary, while not a party to a contract, was intended to be the beneficiary of the contract. As an example, if a close friend paid a painter to paint your house and the painter decided he didn't have to do it because your friend had died, you could sue for damages, the cost of having the house painted, because you were the third-party beneficiary of the contract.

Accord and Satisfaction

Accord and satisfaction is an agreement to accept something different from (usually less than) what a contract provides for in satisfaction of the obligation.

When a debt is in dispute, based on factors such as the condition of the property or the quality of repairs made, the parties can agree to accept a lesser sum. For example, if a debt is in dispute and a check is tendered with a statement that it is in full satisfaction of the debt, endorsing and cashing the check will be considered full satisfaction of the debt. However, Civil Code Section 1526 says the creditor may cross out the words “payment in full” on a check and cash it without agreeing to accord and satisfaction of a disputed amount or debt.

Novation

A **novation** is an agreement to substitute. Usually, it is the substitution of one party for another party under the contract. The prior party, in that case, would be relieved of all obligations under the contract.

Tender

A tender is an offer to perform. A party might refuse a proper tender in the mistaken belief that the tender was improper. As an example, a party might refuse \$4,000 to discharge a debt with the mistaken belief that \$4,400 was due. The refusal of full payment under a contract does not excuse the debt, but it does prevent future interest from accumulating until the party agrees to accept the proper tender.

If a person’s performance is a condition precedent or a concurrent condition for the performance of the other party, the first party must make a tender of performance to hold the other party in default.

Tender is not required to hold another party in default if tender of performance would be an idle act. For example, if a seller under a purchase contract sells the property to another, the buyer does not have to tender the purchase price because the seller is no longer capable of making a conveyance.

Doctrine of Substantial Performance

Substantial performance allows recovery when an unintentional breach has occurred and the noncompliance is not related to substantial matters. Normally, the doctrine of substantial performance involves construction contracts, where a different or less expensive material than was specified was used, but the different material did not endanger the structure. In such a case, a court normally will say that the contract price should be reduced by the difference in value of the structure as built, and the value the structure would have had if the contract had been strictly complied with.

CONTRACTUAL REMEDIES

The judicial remedies discussed in Unit 1 apply to breach of contract.

Monetary Damages

Compensatory damages Compensatory damages are awarded to make the injured party whole. They are financial compensation for the loss suffered.

When a real estate purchase contract is breached, the measure of monetary damages would be the difference between the contract price and the property's fair market value at the time of the contract breach. (*Reese v. Wong* (2001) 93 C.A.4th 51)

If a service or construction contract were breached, the measure of damages would be the additional reasonable costs incurred for the work in excess of the original contract price.

An injured party has a duty to keep damages to a minimum or to mitigate them. For example, if a lessee breaches a lease, the lessor has a duty to use reasonable efforts to rerent the premises.

CASE STUDY The case of *Erllich v. Menezes* (1999) 21 C.4th 543 involved a “dream home” built on an ocean view lot. Two months after occupancy, rain saturated the bedrooms and left 3 inches of water in the living room. Nearly every window leaked. The garage ceiling liquefied and fell in chunks. Structural engineers found serious construction errors. The Erlichs sued the builder Menezes. The San Luis Obispo County Superior Court awarded them \$406,700 for the cost of repairs, \$100,000 for emotional distress, and \$50,000 for physical pain and suffering. The Court of Appeal affirmed the award.

The California Supreme Court affirmed as to the cost of repair but reversed the award for emotional distress. The court held that negligent breach of contract is not sufficient alone to support a tort action. To find the builder liable for emotional distress, the breach of contract must be accompanied by fraud, or the party must realize the breach will cause serious harm in the form of anguish, etc.

Note: Damages for defective construction are limited to repair costs, lost use, and/or relocation expenses, or the diminution in value.

Punitive or exemplary damages These damages are awarded in addition to compensatory damages to punish the wrongdoer. They are awarded by courts for intentional and outrageous acts. Excessive punitive damages will not be upheld by the courts.

CASE STUDY In the case of *Storage Services v. C.R. Oosterbaan et al.* (1989) 214 C.A.3d 498, the trial court had awarded \$75,000 in punitive damages against an agent because of fraud. This was at least one-third of the agent's net worth and more than the agent's annual gross income. The court pointed out that generally punitive damage awards exceeding 10% of a defendant's net worth have been considered excessive. The court ordered a new trial on the damages unless the plaintiff agreed to a reduced award of \$20,000.

Nominal damages Nominal damages are a token sum, such as \$1 or \$10, awarded for a breach where no real compensatory damages were warranted.

Liquidated damages Liquidated damages are agreed to at the time of contracting. Typically, purchase agreements call for the forfeiture of the down payment as liquidated damages in the event the buyer defaults. Construction contracts often have a per-day charge as liquidated damages in the event of a delay in completion.

Since July 1, 1978, liquidated damages on residential purchase agreements of one to four units where the buyer intends to occupy a unit have been limited by law. The liquidated damages to be forfeited if the buyer defaults cannot exceed 3% of the sales price or the actual deposit amount, whichever is less if both parties so agreed in the contract. The defaulting buyer is entitled to a further refund if the buyer proves that the retained amount is unreasonable, such as a sale at an equal or higher price to another party within six months.

Liquidated damages for commercial property and for more than four residential units are not subject to these limitations. They are allowed so long as they are reasonable and reflect what possible damages could be anticipated if a breach of the contract were to occur. If, however, the damages are unreasonably high, the court will consider them a penalty and will not enforce the damages.

CASE STUDY In the case of *Kuish v. Smith* (2010) 181 C.A. 4th 1419, the purchase contract for \$14 million provided that the \$620,000 deposit was "nonrefundable." (There was no liquidated damages provision.) The buyer canceled and the seller resold the property for \$15 million. The seller refused to return the original buyer's deposit.

The trial court ruled that the seller could keep the deposit, which was not an unlawful forfeiture.

The Court of Appeal reversed. The seller had not incurred damages because the property was resold at a higher price. In the absence of a liquidated damages provision, "nonrefundable" means that the seller can retain deposit only to the extent of actual damages incurred.

Waiver of damages In contract, people cannot waive their rights to hold another personally liable for damages for fraud, willful acts, or violations of the law, either willful or negligent (Civil Code Section 1668). Nevertheless, some contracts still contain such waivers of this type, apparently based on the reasoning that if people do not think they have any rights, they will not seek to enforce them.

CASE STUDY In the case of *Salton Bay Marina v. Imperial Irr. Dist.* (1985) 172 C.A.3d 914, the plaintiffs had a written agreement with the irrigation district that shielded the irrigation district from liability and gave the district the right to flood the plaintiffs' property. According to Civil Code Section 1668, contracts affecting public interest that purport to exempt a party from liability for negligence are against public policy and void. The court held that the flooding agreements were contracts affecting the public interest that attempted to exempt the district from its own negligence. The agreement was therefore against public policy and void.

Equitable Remedies

Specific performance Specific performance forces a party to perform as agreed and is awarded only when compensating damages are inadequate.

Because land is a unique commodity, specific performance will be enforced for the sale or lease of land, agreements to convey easements, and lease assignments. Specific performance would most likely be granted to buyers or lessees when there is a compelling need for a particular property. Property sellers normally resell and sue for consequential damages from the defaulting first buyer rather than seek specific performance; however, sellers may be granted specific performance.

CASE STUDY The case of *BD Inns v. Pooley* (1990) 218 C.A.3d 289 involved an agreement by Pooley to buy an 840-unit motel built by BD Inns for \$6,825,000. The court held that, while BD Inns could have sued for monetary damages, it still had a legal remedy of specific performance to which it was entitled.

Because specific performance is an equitable remedy, it will not be granted if

- there has not been adequate consideration;
- it is not just and reasonable;
- the agreement was obtained by unfair practices; or
- the agreement was entered into under a misapprehension (Civil Code Section 3391).

CASE STUDY In the case of *Gilbert v. Mercer* (1960) 179 C.A.2d 29, an owner agreed to sell 65 acres of land for \$325. Before the title was transferred, the prospective purchaser gave a listing on the property for \$3,750 and received an offer for \$3,500. The court refused to grant the buyer specific performance. The court held that there was sufficient evidence that the consideration was not adequate, and that in an action for specific performance, the plaintiff must plead and prove adequacy of consideration.

Reformation In asking for the equitable remedy of reformation, a party is requesting that the contract be modified to reflect what was intended by the parties. Reformation will be granted only when there was a complete understanding between the parties that was not properly reflected because of fraud or a mutual mistake in drafting the contract, such as a typographical error in a legal description in a deed that provides a transfer of property other than what was intended to be conveyed.

Injunction An injunction is a remedy in equity that orders a party to cease an activity, such as trespass. Prohibiting an action prevents future harm. Courts may order a permanent injunction or simply a temporary restraining order. As an example, a court might order a person to cease an activity that is in violation of a deed restriction.

Declaratory relief The remedy of declaratory relief results in a court order determining the rights and duties of the parties. This remedy can be sought before actual damages occur.

Rescission Rescission is a retroactive cancellation or annulment of a contract. Rescission returns parties to their position before contracting. The basis for rescission can be fraud, mutual mistake of fact, impossibility of performance, undue influence, or lack of contractual capacity.

Statutes also provide for rescission in a number of specific cases, including the following:

- Time-share purchasers in California have 72 hours after contracting to rescind their contracts.
- Purchasers in undivided interest subdivisions have a right of rescission within three days of executing the contract.
- Civil Code Section 1689.6, dealing with home solicitation sales, provides a three-business-day right of rescission.
- Civil Code Sections 1695.13–1695.14 provide for rescission within two years on home equity sales where a buyer of one to four residential units took unconscionable advantage of an owner in foreclosure.
- Section 66499.32 of the Government Code allows buyers to rescind within one year of discovery that a parcel was wrongfully divided according to the Subdivision Map Act.
- The Interstate Land Full Disclosure Sales Act, 15 U.S. Code Section 1703(b), gives purchasers the right to rescind within seven days after signing for purchase of undeveloped land covered by the act.

- According to the Truth in Lending Act, 15 U.S. Code Section 1635(a), buyers may rescind up until midnight on the third business day following a transaction that places a lien on the borrower's residence. The rescission rights do not apply to purchase money, primary loans, or loans in which a state agency is the lender.

For a minor breach, courts ordinarily will allow only compensatory damages, not rescission.

Waiver Waiver is the act of giving up a right. A party to a contract can waive a breach and accept the performance as received. A party also can waive any contractual condition that was for his sole benefit. For example, if a contract required a termite report before closing, the purchaser could waive the noncompliance because the report was for the purchaser's sole benefit.

ASSIGNMENT OF CONTRACT

In an **assignment of a contract**, the assignor transfers the assignor's interest in the contract to a third-person assignee. In an assignment, the assignee becomes primarily liable under the contract, while the assignor retains secondary liability should the assignee default on required performance (to avoid this contingent liability, see "Novation" earlier in the unit). The assignee takes all the rights and duties of the assignor.

In the absence of an agreement to the contrary, all or part of the performance under a contract can be assigned to another. The nature of some contracts, however, precludes their assignment. When a person contracts for another person's skill, such as an architect's services, the architect generally cannot assign the contract to another. If an agreement required taking an unsecured personal note, the person giving the note would not be able to assign that function to another. Because an agency agreement is considered personal in nature, agencies generally cannot be assigned.

STATUTE OF FRAUDS

The **statute of frauds** comes from English common law and was designed to prevent people from committing fraud by claiming to have orally agreed to purchase the land of another person. Because land was considered the basis of all wealth, it was determined that agreements concerning land were too important to be oral. The California Statute of Frauds (Civil Code Section 1624) requires the following agreements to be in writing:

- Contracts for the transfer of real property or any interest therein
- Real property leases for more than one year (an oral lease for six months therefore could be valid)
- Contracts that cannot be performed within one year (an agreement for a six-month lease starting in seven months would have to be in writing because it could not be performed within one year of the agreement)
- Sales of personal property for more than \$5,000
- Contracts by executors or administrators of estates

- Agreements to answer to the debt or default of another
- Listing agreements for the sale or lease of real property for more than one year (Civil Code Section 1624(5))

The statute of frauds applies to executory contracts because contracts that fail to comply are unenforceable. After a contract has been fully performed (executed contract), however, the statute of frauds cannot be raised.

The statute of frauds does not require a formal contract, but a note or letter memorandum or a series of notes and memorandums must show a complete agreement. A telegram, for example, can satisfy the statute of frauds.

The agreement need not be signed by all the parties. It need be signed only by the party who is sought to be bound to the agreement or by that person's agent. The signature on the document need not be handwritten as long as it was intended as a signature. For example, if it could be shown that a person used a rubber stamp to sign an agreement, the rubber stamp signature would satisfy the statute of frauds.

Foreign Language Negotiations

If a contract is negotiated in Spanish, Chinese, Tagalog, Vietnamese, or Korean, a translation of the contract must be furnished before execution in the language in which it was negotiated.

Parol Evidence Rule

The **parol evidence** rule provides that oral extrinsic evidence may not be introduced to modify a written document that is complete on its face. While parol evidence cannot be used to modify a clearly written contract, it is admissible to show a later oral modification of the written contract.

Parol evidence also can be used to clarify an ambiguity; to show fraud, undue influence, or a mutual mistake of fact; or to show that the instrument was represented to be other than a contract.

CASE STUDY In *Seck v. Foulks* (1972) 25 C.A.3d 556, the memorandum in Figure 5.1 was written on the back of the broker's business card and was initialed by the owner.

The court held that the memorandum need not be a complete contract, provided it showed authority to act. The other terms may be shown by parol (oral) evidence. In this case, parol evidence indicated that "Sitten" referred to the seller's attorney, to whom the offer was to be presented. "310 M/L" referred to the parcel size, 310 acres, more or less. The agreement was entered into on 3/24/65 and was to terminate on 10/1/65. The court determined in this case that the writing was sufficient to satisfy the statute of frauds.

FIGURE 5.1: The “Sitten” Memorandum

"Sitten"
 310 m/x
 \$2,000 per acre
 1/2 down
 bal 5 years
 5% int
 5-24-65 quarterly with int.
 Keep taxes up to date
 1/2 mineral rights
 6% comm.
 10/1/65
 GWF

Estoppel

The doctrine of **estoppel** or promissory estoppel means that a person may not assert a right when that person's previous statements, actions, or silence caused another party to act to their detriment. For example, assume that an oral agreement had been made for the sale of a lot, and the purchaser, with the knowledge of the seller, made extensive improvements to the lot. The seller would be estopped (prevented) from raising the defense of the statute of frauds because the seller's statement caused the purchaser to act to his detriment (acceptance could be inferred by conduct). If the seller could have voided the sale, then the seller would have been unjustly enriched.

CASE STUDY The case of *ARYA Group, Inc. v. Cher* (2000) 77 C.A.4th 610 involved a partially completed oral construction contract. The entertainer Cher negotiated with the ARYA Group, Inc., to design and build a house on her Malibu property for \$4,217,529 with progress payments. The contract was delivered to Cher and, despite her promise to do so, the contract was never signed by Cher and delivered to the contractor. The contractor was induced to begin work and did receive some progress payments.

Cher requested that ARYA meet with Janet Bussell of Tuft Design Group, who had previously worked with Cher on a speculative residential project. It was alleged that the purpose of the meetings was to obtain proprietary information from ARYA. Cher then terminated the "oral" contract with ARYA and failed to pay \$415,169.41 due to ARYA. Cher contacted ARYA's subcontractors to induce them to work directly with her and had ARYA's building permits transferred to her name. It was alleged that Cher never intended to sign the contract with ARYA. ARYA sued Cher for breach of contract. Cher demurred on the grounds that the statute of frauds (B&PC 7164) required a written contract. The Los Angeles County Superior Court dismissed the lawsuit because ARYA did not have a signed contract.

The Court of Appeal reversed, ruling that ARYA's allegations were sufficient to support a claim of unjust enrichment. While the court noted that "generally speaking" a contract made in violation of a regulatory statute is void, the rule is not inflexible. The court noted that Cher is a highly sophisticated homeowner with previous involvement in residential construction projects and that legal representatives assisted Cher in negotiating the construction agreement. The court pointed out that substantial work had been completed and Cher would be unjustly enriched if she were not required to pay ARYA. The court distinguished this case from *Phillippe v. Shapell Indus.* because construction is tangible and the benefit is apparent while a broker's services are intangible. The court noted that if failure to compensate the contractor would not have resulted in unjust enrichment, then the contractor would not have been entitled to collect.

CASE STUDY The case of *Phillippe v. Shapell Indus. Inc.* (1987) 43 C.3d 1247 involved an oral promise to pay a commission. Prince, the director of land acquisitions for Shapell, orally agreed to pay Phillippe, a licensed real estate broker, a commission for land found by Phillippe that was acquired by Shapell. Phillippe showed a parcel of land to Shapell that was rejected because of zoning. When the zoning was amended a year later, Shapell purchased the parcel for \$2.7 million.

While the trial court awarded Phillippe \$125,000 in commission, the California Supreme Court reversed the judgment. Civil Code Section 1624(d) requires that a broker employment agreement be in writing. The fact that Shapell was itself a broker does not alter the statute (this was not an agreement between brokers to split a commission). The court stated that, except for a few narrow exceptions, a broker may not assert estoppel as a defense against the statute of frauds. While the broker had been promised a commission, Phillippe knew the rules and was not entitled to any commission due to a lack of a written sales commission agreement.

STATUTE OF LIMITATIONS

If an action is not brought within a prescribed period, it becomes barred by the statute of limitations. Thus, a contract may be valid but unenforceable. People who ignore their rights can lose them through the passage of time.

In California, various statutes of limitations provide the following time periods:

- Ninety days—actions by former tenants to recover belongings left in furnished quarters
- Two years—personal injury
- Two years—actions based on oral contracts
- Three years—actions for damages due to trespass

- Three years—attachment lien
- Three years from date of discovery—actions for relief under a contract based on fraud or mistake
- Three years—replevin actions (to recover goods wrongfully held by another)
- Three years—disciplinary actions against a real estate licensee (if the action is based on fraud, the time period is three years or one year after discovery of fraud, whichever is later)
- Four years—most actions based on written contracts (the statute of limitations for contracts runs from the time the agreement was breached, not from the date of the agreement)
- Five years—actions for recovery of real property and the profits from the property
- Five years—to challenge a void or voidable deed or other document (20 years if the claimant is a minor or insane)
- Ten years—actions based on judgments and latent defects in real property
- Code of Civil Procedure § 323—unless otherwise stated, the statute of limitations is four years

If a partial payment is made and accepted on a debt, the statute of limitations period on the debt would start again from the date of the partial payment.

LACHES

Laches is preventing a person from asserting a right or claim when that person's delay in asserting that right causes or results in disadvantage, injury, injustice, detriment, or prejudice to the defendant in a lawsuit. For example, a person could be estopped by laches from having an encroachment removed if the person was aware of the construction and waited until it was completed to demand its removal. To grant the landowner rights would not be equitable, based on the delay in bringing action. (Unlike the statute of limitations, laches is considered an equitable defense.)

SEALS

Seals—marks or impressions—were required on certain contracts in England to authenticate the execution of a document. Their use grew out of a period when most individuals were illiterate and had to make their “mark.”

States that require seals accept a simple “(Seal)” or “L.S.,” which stands for “Locus Sigilli” (the place of the seal).

California does not require seals on any documents, but if a corporation that has a seal uses it on a document, it is presumed that the person(s) signing did so with corporate authority.

JUDGMENTS

When a court adjudicates a dispute, the final order of the court is a **judgment**. Unless the order is appealed to a higher court, the judgment is enforceable. Most judgments are for a monetary payment.

Recording an abstract of a monetary judgment creates a lien on all of the debtor's property in the county where it is recorded. A judgment lien is good for 10 years and may be renewed. Judgment liens for child or spousal support remain enforceable until paid in full without the necessity of renewal.

If the debtor fails to pay after a judgment has been entered, the creditor can get a writ of execution whereby the sheriff seizes and sells assets of the debtor to satisfy the debt. (Judgments will be covered in greater detail in Unit 11.)

Attorneys often tell clients that there are three necessities for a successful lawsuit. There must be (1) a wrongful act or omission that (2) has resulted in a loss or injury to the plaintiff and (3) the defendant must have assets or insurance coverage. Without number 1, the defendant has no liability. Without number 2, there are no damages to be compensated. Without number 3, time and money would be expended to gain an uncollectible judgment.

SUMMARY

Contracts are either express (stated) or implied, bilateral (promise for a promise) or unilateral (promise for an act), or executory (not yet fully performed) or executed (fully performed).

Contracts that meet all contractual requirements are valid contracts; contracts that do not are void. Voidable contracts are valid unless voided by the injured party.

Most contracts can be disaffirmed by minors within a reasonable period after reaching the age of 18, or by people lacking mental capacities to contract but not declared incompetent.

Other reasons for voiding a contract include

- fraud,
- misrepresentation,
- duress and menace, and
- undue influence.

Options to contract are agreements whereby one party has the right to contract. A right of first refusal is a first right to purchase should a seller decide to sell to another.

Courts ordinarily will try to interpret contracts in accordance with the intent of the parties.

Excuses for nonperformance include impossibility of performance and commercial frustration.

A breach of a contract is a failure to perform a contractual provision as agreed.

A party can waive a breach by the other party or waive any contractual condition that is for the initial party's sole benefit.

Parties can agree to accept something other than what was agreed to. This is known as accord and satisfaction. A novation is an agreement to substitute one party for another under the contract and relieves the original party of all obligations under the contract.

A tender is an offer to perform a contract.

The doctrine of substantial performance excuses a minor unintentional breach of a contract. While the breach would not be a basis for terminating the agreement, the contract price would be reduced to reflect the difference in performance.

Contractual remedies for a breach of contract are monetary or equitable.

Monetary remedies include compensatory damages, punitive or exemplary damages, and nominal damages, as well as liquidated damages.

Equitable remedies include specific performance, reformation, injunction, declaratory relief, and rescission.

Contracts that do not by their terms prohibit assignment and are not personal in nature can be assigned. Under an assignment, the assignee becomes primarily liable under the contract. Obligations under a contract can be delegated to another. Unlike an assignment, the person obligated retains primary liability for the contractual performance.

The statute of frauds requires certain contracts, including contracts for the transfer of real property and leases for more than one year, to be in writing.

Copies of contracts in the language used for negotiations must be provided for designated languages.

Parol or oral evidence cannot be used to show that a contract that appears complete upon its face means other than what it says. Parol evidence can be used to show fraud or to clarify an ambiguity.

People can be estopped from raising the defense of the statute of frauds if, by their words or actions, induce others to act to their detriment.

The statute of limitations deals with statutory time limitations on bringing legal action.

Laches is an equitable defense that prevents parties from asserting a claim if their unreasonable delay in bringing action worked to the prejudice of the other party.

A judgment is the final order of a court. When recorded, an abstract of judgment becomes a judgment lien on all the debtor's property in the county where the judgment is recorded.

DISCUSSION CASES

1. A notation on a check stated, "Down payment on Lot 16 of Berwyn Heights. Full Price to be \$4,000." The check was endorsed by the payee. **In the absence of any other written document, has the statute of frauds been complied with?**
2. In the sale of four lots, the escrow inadvertently left out the necessary reservation of a right-of-way from one of the lots. A subsequent holder requests reformation. **Will it be granted?**

Shupe v. Nelson (1967) 254 C.A.2d 693

3. The plaintiff acted as a rental agent and informed the owner that he would like to represent him in selling the property. No written agreement was drawn up, although several offers were submitted. The plaintiff received an offer for \$100,000 and requested authorization to sell. The owner sent a telegram to the plaintiff stating, "This will confirm that I will sell 608 South Bay Front Balboa Island for \$100,000 cash. This offer good until noon 1-19-60. Chas. P. Hansen." The owner subsequently refused to sign a standard form deposit receipt providing for a 5% commission. **Is the plaintiff broker entitled to a commission?**

Franklin v. Hansen (1963) 59 C.2d 570

4. A purchase agreement provided for \$20,000 in liquidated damages should the buyer resell the property to an uncle of the seller. After purchase, the buyer resold to the seller's uncle. The purchaser claimed that the prohibition against resale to the uncle was an unreasonable restraint on alienation (conveyance). **Do you agree?**

Zlotoff v. Tucker (1984) 154 C.A.3d 988

5. A purchaser of a property was given the preemptive right to purchase an adjoining parcel for \$10,000. The owner subsequently sold the lot for \$22,000 without offering it to the holder of the preemptive right to purchase. Was there a valid right to purchase? **If so, what would the damages be?**

Mercer v. Lemmens (1964) 230 C.A.2d 167

6. The lessee leased premises for a restaurant. The greater portion of the premises (on the second floor) had not been used for 14 years. The lease specified that the premises were taken "as is." After entering into the lease, the lessee discovered that extensive and expensive work had to be done inside and outside the premises to meet the building codes. Because of basic structural weaknesses in the building, the second floor could not support a restaurant operation. **Is the lessee liable under the lease?**

William v. Puccinelli (1965) 236 C.A.2d 512

7. A contractor, in working to stabilize soil, broke a sewer pipe causing concrete to spread into the sewer system. The owners sued for damages, but the contractor brought a motion to compel arbitration. The preprinted contract required that controversies be settled “with the Uniform Rules for Better Business Arbitration” The rules, which were not attached to the contract, limit damages to refunds, completion of work, or expenses not to exceed \$2,500. **Should arbitration be required?**

Harper v. Ultimo (2004) 113 C.A.4th 1402

8. The defendants gave the broker an unsigned typewritten document titled “Re Beverly Wilshire Hotel.” It included a description of the hotel, the price of \$2,000,000, and the commission that the hotel would pay. After extensive work by the plaintiff, the defendants gave the plaintiff a carbon copy on a hotel letterhead that included a description of the property and the sale terms. This copy indicated a price of \$2,250,000 and provided for a broker’s commission of 5% on \$50,000 and 2½% on the balance. This memo also was unsigned. Testimony was given that the broker protested that the price was being raised, which would make the sale more difficult, and that the commission was being lowered. An oral agreement was made to a \$57,500 commission, and an unsigned note later was given, indicating a \$57,500 commission. The plaintiff was the procuring cause of the sale, and the defendants refused to pay a commission. **What are the rights of the broker?**

Marks v. Walter G. McCarty Corp. (1949) 33 C.2d 814

9. A lessee of a property authorized repairs, and the owner of the property failed to post a notice of nonresponsibility, which would have protected him against mechanics’ liens. In an action to foreclose on a mechanic’s lien, the owner raised the fact that he was under age 18. **Is this a good defense?**

Burnand v. Irigoyen (1947) 30 C.2d 861

10. A deposit receipt provided that the payment terms were to be arranged after new financing was obtained. **Was there an enforceable contract?**

Burgess v. Rodom (1953) 121 C.A.2d 71

11. The vice president of a bank told both buyers and sellers that the bank would make a \$40 million loan to the purchasers of 11 acres on Wilshire Boulevard in Los Angeles. Based on the oral promise, the buyer and the seller agreed to a sales contract of \$1 million down, \$2 million in 30 days, and \$7 million in 50 days. While the bank covered the first two payments, it rejected the loan application five days before the \$7 million becoming due, which caused the purchasers to default. **Is the bank liable for breach of its oral agreement to make the loan?**

Landes Constr. Co. v. Royal Bank (1987) 833 F.2d 1365

12. A lender agreed to provide financing if the borrower's parents would provide security. The parents agreed to execute a trust deed on property in Sebastopol that they owned with their son. The lender's cover letter referred to the Sebastopol property, but the trust deed prepared by the lender described the parents' residence in Petaluma. **After the son defaulted, what are the rights of the parties?**

Balistreri v. Nevada Livestock Prod. Credit Ass'n (1989) 214 C.A.3d 635

13. An arbitration clause in a purchase contract was initialed by the buyer but not the seller. The clause stated that the "buyer, seller, and agent agree that such controversy shall be settled by final binding arbitration...." **Is arbitration mandatory?**

Marcus Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co. (1998) 68 C.A.4th 83

14. A husband, who had a stroke, made an oral promise to his wife that if she would care for him at home, so he didn't end up in a nursing home, he would leave her specified property. The wife performed her part of the agreement but discovered, upon his death, that the property was willed to his daughter. **Does the wife have rights as to the property?**

Borelli v. Brusseau (1993) 12 C.A.4th 647

15. A seller reneged on a sale contract. The buyer intended to renovate the property for resale. The trial court ruled that the buyer was entitled to return of deposit, planning costs of \$90,000, and \$600,000 in lost profits. **Was the award for lost profits proper?**

Greenwich S.F. LLC v. Wong (2010) 190 C.A. 4th 739

16. In answer to a settlement demand for \$356,000, a developer sent an email, "So I Agree, Tom Fair." Later, a voicemail stated, "I said I agree so that's it." Later, a text message stated, "I have accepted by phone and email. You must tell the court we have an agreement." The developer later refused to sign a settlement. **Was there a binding agreement?**

J.B.B. Investment Partners LTD. v. Fair (2014) 232 C.A. 4th 974

UNIT QUIZ

1. A written contract whereby the seller agrees to convey at an agreed price at a definite time in the future, and the buyer agrees to buy at said time and price would be
 - a. an executory, express, bilateral contract.
 - b. an executed, implied, unilateral contract.
 - c. a valid, express, unilateral contract.
 - d. an enforceable, bilateral, executed contract.
2. When a person, while not of sound mind but not declared insane or wholly without understanding, contracts to buy real property, the contract likely is
 - a. void.
 - b. voidable.
 - c. illegal.
 - d. valid.
3. Mutuality in a contract would ordinarily be indicated by
 - a. consideration.
 - b. offer and acceptance.
 - c. execution.
 - d. waiver.
4. An offer would *NOT* be terminated by
 - a. revocation by the offeror.
 - b. a counteroffer.
 - c. request for an extension for acceptance by the offeree.
 - d. the death of the offeror.
5. In which situation can an offer *NOT* be withdrawn?
 - a. When the seller has not yet had an opportunity to accept it
 - b. When the stated period for which it would remain open has not expired
 - c. When notification of acceptance has been mailed
 - d. When the deposit has not been forfeited
6. Which is *TRUE* regarding acceptance and/or revocation of an offer?
 - a. Revocation takes place upon receipt.
 - b. Acceptance takes place upon mailing.
 - c. Both are true.
 - d. Neither is true.

7. Albert gave his friend Baker a deed to a property, which Baker recorded. A year later, Albert and Baker had a dispute. Albert demanded the return of the property because Baker had not given any consideration for the property transfer. Assuming there was no consideration, which statement is correct?
 - a. Albert can obtain revocation because of lack of consideration.
 - b. The agreement is void because of lack of consideration.
 - c. Albert is entitled to the fair market value of the property conveyed.
 - d. Baker can keep the property, which was a completed gift.
8. An example of fraud would be
 - a. a promise made by one who did not intend to keep it.
 - b. a false statement of fact by one who does not know if it is fact or not.
 - c. the act of hiding a defect so another party will not know of it.
 - d. all of these.
9. Albert knew that Keith was lying about the property's income, but Albert nevertheless completed the purchase. When Albert changed his mind, Albert could
 - a. void the contract.
 - b. collect damages for the fraud.
 - c. do either of these.
 - d. do neither of these.
10. Which statement about options is *FALSE*?
 - a. Consideration is necessary for a valid option.
 - b. The optionee has the option to exercise or refrain from exercising the option.
 - c. The optionor can revoke the option by returning the consideration.
 - d. Options can be assigned unless personal in nature or prohibited by the option terms.
11. Which statement describes how a court will interpret an ambiguous contract?
 - a. Words take precedence over numerals.
 - b. Parol evidence can be admitted to show intent.
 - c. Handwritten takes precedence over typed.
 - d. All of these describe how a court will interpret an ambiguous contract.
12. An agreement whereby one party to a contract is discharged and another party becomes obligated is
 - a. an accord and satisfaction.
 - b. a reformation.
 - c. a novation.
 - d. a rescission.

13. Which is *NOT* an equitable remedy?
 - a. Reformation
 - b. Compensatory damages
 - c. Rescission
 - d. Specific performance
14. Forfeiture of agreed damages in a contract is known as
 - a. mitigated damages.
 - b. subordination.
 - c. liquidated damages.
 - d. punitive damages.
15. Liquidated damages on a duplex that the buyer intended to occupy called for the forfeiture of a \$10,000 deposit on a \$100,000 purchase price. After the buyer's default, the seller must return
 - a. the entire deposit.
 - b. \$7,000.
 - c. \$23,000.
 - d. nothing.
16. The fact that every parcel of real estate is unique is the reason for the remedy of
 - a. specific performance.
 - b. injunction.
 - c. reformation.
 - d. punitive damages.
17. When, after close of escrow, the purchaser discovered that the seller's broker had materially misrepresented the income, the purchaser could
 - a. sue for rescission.
 - b. accept the property as is.
 - c. sue the seller and the broker for damages.
 - d. do any of these.
18. Which is *TRUE* regarding the difference between waiver and rescission?
 - a. Waiver leaves the parties as they are.
 - b. Rescission puts the parties back the way they were.
 - c. Both are true.
 - d. Neither is true.

19. Which is *NOT* a requirement of every valid contract?
 - a. Consideration
 - b. Meeting of the minds
 - c. Writing
 - d. Legal purpose
20. An oral real estate lease for six months starting in six months is
 - a. valid.
 - b. void.
 - c. voidable.
 - d. illegal.
21. After Albert agreed orally to sell to Smith, Smith made extensive improvements to the property with the knowledge of Albert. Albert now refuses to sell because the sales agreement was oral. What will be the result?
 - a. Albert does not have to sell, based on the statute of frauds.
 - b. Albert must sell, because of the doctrine of estoppel.
 - c. Albert must sell, because of laches.
 - d. Albert's only remedy is compensatory damages.
22. The passage of time can make a valid contract
 - a. invalid.
 - b. illegal.
 - c. unenforceable.
 - d. voidable.
23. In California, the statute of limitations for verbal contracts is
 - a. two years.
 - b. three years.
 - c. four years.
 - d. 10 years.
24. Losing a right because of failure to assert it in a timely manner is known as
 - a. rescission.
 - b. laches.
 - c. estoppel.
 - d. specific performance.

25. Which is a *TRUE* statement about judgments?
- a. They are good for 10 years.
 - b. They can be renewed.
 - c. When recorded, they create a general lien in the county of recordation.
 - d. All of these statements are true.

6

UNIT SIX



REAL ESTATE CONTRACTS

KEY TERMS

advance costs	exclusive agency listing	loan broker listing
advance fee addendum	exclusive authorization and	no deal–no commission
burden of proof	right-to-sell listing	open listings
buyer listing	good faith	privity of contract
cooperating broker fee	hold-harmless clauses	procuring cause
agreements	interim occupancy	safety clause
due diligence	agreement	

LISTINGS

A listing is an agency contract whereby a principal (usually the property owner) appoints an agent (a real estate broker) to perform some tasks. Customarily, the principal gives the agent a listing to procure a buyer or a lessee for specified property. Listings also can be created for the purpose of locating property for a buyer or obtaining financing. A listing can also be for a loan modification.

An agent who is to procure a buyer generally is not given the power to obligate the principal contractually. The agent solicits offers; the principal accepts or rejects them.

A buyer's agent locates property for the buyer's consideration. The buyer makes any purchase decision.

To be enforceable, listing agreements for real estate must be in writing (Civil Code Section 1624(5)).

The case of *Franklin v. Hansen* (1963) 59 C.2d 570 makes it clear that a broker cannot enforce a verbal commission agreement.

Because listings are contracts, they require all the elements of a valid contract to be enforceable: mutual consent, consideration, legal purpose, and competent parties.

Listings must be specific about the subject matter of the agency. They also should be specific about price and terms, if any. If no price is specified, the principal will not be obligated to the agent if the principal refuses an offer at a fair price. If no terms are specified, the principal can refuse a full-price offer if not for cash, and the principal will not be obligated to any commission.

Listings usually authorize an agent to place a For Sale sign on the property. Without such authorization, the agent does not have the right to place a sign.

An agent is not entitled to compensation if not provided for in the listing agreement. Authorizing an agent to procure a buyer does not imply that the owner will pay a fee if the agent is successful. There can be a gratuitous agency.

Unless the listing authorizes the agent to accept a deposit, the agent will have to take deposits as the agent of the buyer.

Hold-harmless clauses customarily are included in listings. The owner agrees to hold the agent harmless and indemnify the agent for losses in the event the owner fails to provide a disclosure or fails to provide correct information. Such a clause probably would not entitle brokers to recover a loss if they knew, or should have known, an owner was mistaken. Like most contracts, listings usually provide that, in the event of legal action, the prevailing party will be entitled to legal fees.

Unless a listing authorizes an agent to employ subagents, the agent has no authority to do so. An agency is a personal relationship that requires consent, and the principal is responsible for the acts of the agent within the scope of the agency. The agent therefore has no authority to expand the liability of the principal to acts of subagents without the express authority of the principal. The CAR listing form in Figure 6.1 does not provide for subagency but provides for cooperation with other brokers.

The listing agreement is between the principal and the agent and cannot be enforced by third parties. For example, a prospective buyer could not force an owner to accept an offer at a property's listed price because no **privity of contract** (contractual relationship) exists between the owner and the prospective buyer. The agent, however, might be entitled to a commission. An exception would be refusal of the owner to accept an offer on the terms of the listing because of unlawful discrimination (see the discussion of fair housing in Unit 4).

If the consummation of a sale is prevented by the default of the agent's principal or by the principal's inability to convey marketable title, the sales agent will be entitled to a commission because the agent fully performed as required by the agency.

The **burden of proof** of performance is on the agent. To collect a commission, the agent must show full compliance with the agent's obligations according to the contract or the principal's wrongful breach of obligations.

The rate or amount of commission may not be preprinted in a listing contract for the sale of a building with one to four residential units. This includes mobile homes. The agreement also must contain the following statement in 10-point boldface type: **"Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Seller and Broker."** You will find this notice on the sample listing agreement.

A commission customarily is earned under a valid listing upon the execution of a valid purchase agreement unless conditions remain to be fulfilled. The commission normally is paid upon close of escrow, which could be sometime after the commission is earned.

If a listing requires consummation of the sale, the sale must be consummated for the broker to earn a commission (**no deal–no commission**). If in such a case the buyer breaches the contract and the owner does not pursue legal remedies for the breach, the broker gets nothing.

If the owner breaches the agreement, the broker is entitled to a commission because the principal's action violated the implied condition of **good-faith** dealings. Similarly, if the buyer's obligation was conditional and the seller prevented the satisfaction of the conditions, the broker would be entitled to a commission.

CASE STUDY In the case of *City of Turlock v. Paul M. Zagaris Inc.* (1989) 209 C.A.3d 189, a real estate contract signed only by the buyer and the seller acknowledged that the seller owed the broker a 6% sales commission to be paid as the price was received. This was the sole agreement on commission. Because the city acquired the property by condemnation, escrow never closed. The broker asserted his commission in the condemnation action, alleging "vested contractual rights." The Court of Appeal held that the broker's right was contingent on the escrow closing, so the broker lost his rights when the escrow failed to close.

CASE STUDY The case of *R.J. Kuhl Corp. v. Sullivan* (1993) 13 C.A.4th 1589 involved a buyer's agent who entered into negotiations for a purchase. The buyer's agent contract called for a commission if a sale was consummated. The negotiations failed and a third party purchased the property. The third party gave the broker's client (Sullivan) an option to buy the property and also agreed to share in paying any commission that the buyer might owe.

The broker sued Sullivan and the third party for breach of contract, failure to pay a commission, and interference and conspiring to interfere with a contractual relationship.

The court held that Sullivan's obligation was subject to the covenant of good faith and fair dealing. The client benefited from the broker's services and profited unfairly. Even though the sale was never consummated, the breach of the covenant of good faith and fair dealing excused the consummation of the sale as a condition of payment.

Exclusive Listings

Most listings are exclusive listings, in which the owner makes the agent the owner's exclusive agent to procure a buyer and agrees to pay a commission should the agent succeed. The agent promises to use **due diligence** in procuring a buyer. As mentioned in Unit 5, this mutual exchange of promises makes exclusive listings bilateral contracts.

Exclusive listings must be signed by the owner. While the signature of one spouse alone on any listing is sufficient to obligate the community property to a commission, both spouses must sign the deed to sell community property. A spouse who has signed the listing will be less likely to refuse to convey; therefore, the signatures of both spouses are desirable.

Agents are required to give a copy of an exclusive listing to the owners at the time they sign. Failure to do so does not void the listing, but it does subject the agent to disciplinary action. Listings normally include a statement above the principal's signature that the principal acknowledges having received a copy of the listing. This acknowledgment serves as protection against later claims by principals that they did not receive a copy as required. (Notice the statement above the signature space in Figure 6.1.)

Exclusive listings must have a definite termination date. Stating that the listing will expire within a stated period after a notice is given to terminate is not enough. In the absence of a definite termination date, the listing can be terminated by the owner without notice, provided the owner has not benefited from the listing by a sale. The absence of a termination date on an exclusive listing also subjects the agent to disciplinary action that could include suspension or revocation of the agent's license.

CASE STUDY In *Nystrom v. First National Bank of Fresno* (1978) 81 C.A.3d 759, a 90-day exclusive listing was not to be effective until a deed was acquired at a forthcoming trustee's sale. In an action to collect a commission where a sale was consummated by another broker, the court held that, while the beginning date was uncertain, the listing did have a definite date for termination.

Exclusive listings generally provide that if the seller cancels the listing, leases, or rents the property without the approval of the agent, or otherwise adversely affects its marketability, the agent is entitled to a commission.

FIGURE 6.1: Exclusive Authorization and Right To Sell

The following form is copyrighted by the California Association of REALTORS®, © 2021, and is reprinted under a limited license with permission. Photocopying or any other reproduction, whether electronic or otherwise, is strictly prohibited.



RESIDENTIAL LISTING AGREEMENT
(Exclusive Authorization and Right to Sell)
 (C.A.R. Form RLA, Revised 6/21)

Date Prepared: _____

1. **EXCLUSIVE RIGHT TO SELL:** _____ ("Seller")
 hereby employs and grants _____ ("Broker")
 beginning (date) _____ and ending at 11:59 P.M. on (date) _____ ("Listing Period")
 the exclusive and irrevocable right to sell or exchange the real property described as _____

_____, situated in _____ (City),
 _____ (County), California, _____ (Zip Code), Assessor's Parcel No. _____ ("Property").

☐ This Property is a manufactured (mobile) home. See Manufactured Home Listing Addendum (C.A.R. form MHLA) for additional terms.

☐ This Property is being sold as part of a probate, conservatorship, guardianship, or receivership. See for Probate Listing Addendum and Advisory (C.A.R. Form PLA) additional terms.

2. **LISTING PRICE AND TERMS:**

A. The listing price shall be: _____ Dollars (\$ _____).

B. Listing Terms: _____

3. **COMPENSATION TO BROKER:**

Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Seller and Broker (real estate commissions include all compensation and fees to Broker).

A. Seller agrees to pay to Broker as compensation for services irrespective of agency relationship(s), either ☐ _____ percent of the listing price (or if a purchase agreement is entered into, of the purchase price), or ☐ \$ _____, AND _____, as follows:

(1) If during the Listing Period, or any extension, Broker, cooperating broker, Seller or any other person procures a ready, willing, and able buyer(s) whose offer to purchase the Property on any price and terms is accepted by Seller, provided the Buyer completes the transaction or is prevented from doing so by Seller. (Broker is entitled to compensation whether any escrow resulting from such offer closes during or after the expiration of the Listing Period, or any extension.)

OR (2) If within _____ calendar days (a) after the end of the Listing Period or any extension; or (b) after any cancellation of this Agreement, unless otherwise agreed, Seller enters into a contract to sell, convey, lease or otherwise transfer the Property to anyone ("Prospective Buyer") or that person's related entity: (i) who physically entered and was shown the Property during the Listing Period or any extension by Broker or a cooperating broker; or (ii) for whom Broker or any cooperating broker submitted to Seller a signed, written offer to acquire, lease, exchange or obtain an option on the Property. Seller, however, shall have no obligation to Broker under paragraph 3A(2) unless, not later than the end of the Listing Period or any extension or cancellation, Broker has given Seller a written notice of the names of such Prospective Buyers.

OR (3) If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension.

B. If completion of the sale is prevented by a party to the transaction other than Seller, then compensation which otherwise would have been earned under paragraph 3A shall be payable only if and when Seller collects damages by suit, arbitration, settlement or otherwise, and then in an amount equal to the lesser of one-half of the damages recovered or the above compensation, after first deducting title and escrow expenses and the expenses of collection, if any.

C. In addition, Seller agrees to pay Broker: _____.

D. Seller has been advised of Broker's policy regarding cooperation with, and the amount of compensation offered to, other brokers.

(1) Broker is authorized to cooperate with and compensate brokers participating through the multiple listing service(s) ("MLS") by offering to MLS brokers out of Broker's compensation specified in 3A, either ☐ _____ percent of the purchase price, or ☐ \$ _____.

(2) Broker is authorized to cooperate with and compensate brokers operating outside the MLS as per Broker's policy.

E. Seller hereby irrevocably assigns to Broker the above compensation from Seller's funds and proceeds in escrow. Broker may submit this Agreement, as instructions to compensate Broker pursuant to paragraph 3A, to any escrow regarding the Property involving Seller and a buyer, Prospective Buyer or other transferee.

F. (1) Seller represents that Seller has not previously entered into a listing agreement with another broker regarding the Property, unless specified as follows: _____.

(2) Seller warrants that Seller has no obligation to pay compensation to any other broker regarding the Property unless the Property is transferred to any of the following individuals or entities: _____.

(3) If the Property is sold to anyone listed above during the time Seller is obligated to compensate another broker: (i) Broker is not entitled to compensation under this Agreement; and (ii) Broker is not obligated to represent Seller in such transaction.



FIGURE 6.1: Exclusive Authorization and Right To Sell (continued)

Property Address: _____ Date: _____

4. **A. ITEMS EXCLUDED AND INCLUDED:** Unless otherwise specified in a real estate purchase agreement, all fixtures and fittings that are attached to the Property are included, and personal property items are excluded, from the purchase price.

ADDITIONAL ITEMS EXCLUDED: _____**ADDITIONAL ITEMS INCLUDED:** _____

Seller intends that the above items be excluded or included in offering the Property for sale, but understands that: (i) the purchase agreement supersedes any intention expressed above and will ultimately determine which items are excluded and included in the sale; and (ii) Broker is not responsible for and does not guarantee that the above exclusions and/or inclusions will be in the purchase agreement.

- B. (1) LEASED OR NOT OWNED ITEMS:** The following items are leased or not owned by Seller:

☐ Solar power system ☐ Alarm system ☐ Propane tank ☐ Water Softener
☐ Other _____

(2) LIENED ITEMS: The following items have been financed and a lien has been placed on the Property to secure payment:

☐ Solar power system ☐ Windows or doors ☐ Heating/Ventilation/Air conditioning system
☐ Other _____

Seller will provide to Buyer, as part of the sales agreement, copies of lease documents, or other documents obligating Seller to pay for any such leased or liened item.

5. **MULTIPLE LISTING SERVICE:**

- A. WHAT IS AN MLS?** The MLS is a database of properties for sale that is available and disseminated to and accessible by all other real estate agents who are participants or subscribers to the MLS. As set forth in **paragraph 7**, participants and subscribers conducting public marketing of a property listing must submit the property information to the MLS. Property information submitted to the MLS describes the price, terms and conditions under which the Seller's property is offered for sale (including but not limited to the listing broker's offer of compensation to other brokers). It is likely that a significant number of real estate practitioners in any given area are participants or subscribers to the MLS. The MLS may also be part of a reciprocal agreement to which other multiple listing services belong. Real estate agents belonging to other multiple listing services that have reciprocal agreements with the MLS also have access to the information submitted to the MLS. The MLS may further transmit listing information to Internet sites that post property listings online.
- B. WHAT INFORMATION IS PROVIDED TO THE MLS:** All terms of the transaction, including sales price and financing, if applicable, (i) will be provided to the MLS in which the Property is listed for publication, dissemination and use by persons and entities on terms approved by the MLS, and (ii) may be provided to the MLS even if the Property was not listed with the MLS. Seller consents to Broker providing a copy of this listing agreement to the MLS if required by the MLS.
- C. WHAT IS BROKER'S MLS?** Broker is a participant/subscriber to _____ Multiple Listing Service (MLS) and possibly others. That MLS is (or if checked ☐ is not) the primary MLS for the geographic area of the Property. When required by **paragraph 7** or by the MLS, Property will be listed with the MLS(s) specified above.

6. **BENEFITS OF USING THE MLS; IMPACT OF OPTING OUT OF THE MLS:**

- A. EXPOSURE TO BUYERS THROUGH MLS:** Listing property with an MLS exposes a seller's property to all real estate agents and brokers (and their potential buyer clients) who are participants or subscribers to the MLS or a reciprocating MLS. The MLS may further transmit the MLS database to Internet sites that post property listings online.
- B. IMPACT OF OPTING OUT OF MLS:** If Seller elects to exclude the Property from the MLS, Seller understands and acknowledges that: (i) Seller is authorizing limited exposure of the Property and NO marketing or advertising of the Property to the public will occur; (ii) real estate agents and brokers from other real estate offices, and their buyer clients, who have access to that MLS may not be aware that Seller's Property is offered for sale; (iii) Information about Seller's Property will not be transmitted from the MLS to various real estate Internet sites that are used by the public to search for property listings and; (iv) real estate agents, brokers and members of the public may be unaware of the terms and conditions under which Seller is marketing the Property.
- C. REDUCTION IN EXPOSURE:** Any reduction in exposure of the Property may lower the number of offers and negatively impact the sales price.
- D. NOT LISTING PROPERTY IN A LOCAL MLS:** If the Property is listed in an MLS which does not cover the geographic area where the Property is located then real estate agents and brokers working that territory, and Buyers they represent looking for property in the neighborhood, may not be aware the Property is for sale.

Seller's Initials _____ / _____

Broker's/Agent's Initials _____ / _____

7. **PUBLIC MARKETING OF PROPERTY:**

- A. CLEAR COOPERATION POLICY: MLS rules require** ☐ Do NOT require – see 7F) that residential real property with one to four units and vacant lot listings be submitted to the MLS within 1 business day of any public marketing.
- B. PUBLIC MARKETING WITHIN CLEAR COOPERATION:** (i) **Public marketing** includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays, digital communications marketing and email blasts, multi-brokerage listing sharing networks, marketing to closed or private listing clubs or groups, and applications available to the general public. (ii) Public marketing does not include an office exclusive listing where there is direct promotion of the listing between the brokers and licensees affiliated with the listing brokerage, and one-to-one promotion between these licensees and their clients.
- C. "COMING SOON" STATUS IMPACT ON MARKETING; Days on Market (DOM):** Seller is advised to discuss with Broker the meaning of "Coming Soon" as that term applies to the MLS in which the Property will be listed, and how any Coming Soon status will impact when and how a listing will be viewable to the public via the MLS. Seller does ☐ (does not) authorize Broker to utilize Coming Soon status, if any. Seller is further advised to discuss with Broker how any DOM calculations or similarly utilized tracking field works in the MLS in which the Property will be listed.
- D. Seller Instructs Broker:** (MLS may require C.A.R. Form SELM or local equivalent form)
 (1) Seller instructs Broker to market the Property to the public, and to start marketing on the beginning date of this Agreement or ☐ _____ (date).



FIGURE 6.1: Exclusive Authorization and Right To Sell (continued)

Property Address: _____

- OR (2) ☐ Seller instructs Broker NOT to market the Property to the public. Seller understands that no public marketing will occur and the scope of marketing that will occur will consist only of direct one-on-one promotion between the brokers and licensees affiliated with the listing brokerage and their respective clients.
- E. **Whether 7D(1) or 7D(2) is selected**, Seller understands and agrees that should any public marketing of the Property occur, the Property listing will be submitted to the MLS within 1 business day.
- F. ☐ **CLEAR COOPERATION POLICY DOES NOT APPLY:** Paragraphs 7A (other than the language in the parenthetical), 7B, 7D and 7E do not apply to this listing. Broker shall disclose to Seller and obtain Seller's consent for any instruction to not market the Property on the MLS or to the public.
8. **MLS DATA ON THE INTERNET:** MLS rules allow MLS data to be made available by the MLS to additional Internet sites unless Broker gives the MLS instructions to the contrary. Specific information that can be excluded from the Internet as permitted by (or in accordance with) the MLS is as follows:
- A. **PROPERTY OR PROPERTY ADDRESS:** Seller can instruct Broker to have the MLS not display the Property or the Property address on the Internet (C.A.R. Form SELI). Seller understands that either of these opt-outs would mean consumers searching for listings on the Internet may not see the Property or Property's address in response to their search.
- B. **FEATURE OPT-OUTS:** Seller can instruct Broker to advise the MLS that Seller does not want visitors to MLS Participant or Subscriber Websites or Electronic Displays that display the Property listing to have the features below (C.A.R. Form SELI). Seller understands (i) that these opt-outs apply only to Websites or Electronic Displays of MLS Participants and Subscribers who are real estate broker and agent members of the MLS; (ii) that other Internet sites may or may not have the features set forth herein; and (iii) that neither Broker nor the MLS may have the ability to control or block such features on other Internet sites.
- (1) **COMMENTS AND REVIEWS:** The ability to write comments or reviews about the Property on those sites; or the ability to link to another site containing such comments or reviews if the link is in immediate conjunction with the Property display.
- (2) **AUTOMATED ESTIMATE OF VALUE:** The ability to create an automated estimate of value or to link to another site containing such an estimate of value if the link is in immediate conjunction with the Property display.
☐ Seller elects to opt out of certain Internet features as provided by C.A.R. Form SELI or the local equivalent form.
9. **SELLER REPRESENTATIONS:** Seller represents that, unless otherwise specified in writing, Seller is unaware of: (i) any Notice of Default recorded against the Property; (ii) any delinquent amounts due under any loan secured by, or other obligation affecting, the Property; (iii) any bankruptcy, insolvency or similar proceeding affecting the Property; (iv) any litigation, arbitration, administrative action, government investigation or other pending or threatened action that affects or may affect the Property or Seller's ability to transfer it; and (v) any current, pending or proposed special assessments affecting the Property. Seller shall promptly notify Broker in writing if Seller becomes aware of any of these items during the Listing Period or any extension thereof.
10. **BROKER'S AND SELLER'S DUTIES:**
- A. **Broker Responsibility, Authority and Limitations:** Broker agrees to exercise reasonable effort and due diligence to achieve the purposes of this Agreement. Unless Seller gives Broker written instructions to the contrary, Broker is authorized, but not required, to (i) order reports and disclosures including those specified in 10D as necessary, (ii) advertise and market the Property by any method and in any medium selected by Broker, including MLS and the Internet, and, to the extent permitted by these media, control the dissemination of the information submitted to any medium; and (iii) disclose to any real estate licensee making an inquiry the receipt of any offers on the Property and the offering price of such offers.
- B. **Presentation of Offers:** Broker agrees to present all offers received for Seller's Property, and present them to Seller as soon as possible, unless Seller gives Broker written instructions to the contrary.
- C. **Buyer Supplemental Offer Letters (Buyer Letters):**
- (1) Paragraph 8 of the Fair Housing and Discrimination Advisory (C.A.R. Form FHDA) attached to this Agreement informs Seller of the practice of many buyers and their agents of including a Buyer Letter with an offer to try to influence a seller to accept the buyer's offer. Buyer Letters may include photos and video. Whether overt or unintentional, Buyer Letters may contain information about a buyer's or seller's protected class or characteristics. Deciding whether to accept an offer based upon protected classes or characteristics is unlawful. Broker will not review the content of Buyer Letters.
- (2) (A) **Seller instructs Broker not to present Buyer Letters**, whether submitted with an offer or separately at a different time. Seller authorizes Broker to specify in the MLS that Buyer Letters will not be presented to Seller.
- OR (B) ☐ **Seller instructs Broker to present Buyer Letters.** Broker advises seller that: (i) Buyer Letters may contain information about protected classes or characteristics and such information should not be used in Seller's decision of whether to accept, reject, or counter a Buyer's offer; and (ii) if Seller relies on Buyer Letters, Seller is acting against Broker's advice and should seek the advice of counsel before doing so.
- D. Seller agrees to consider offers presented by Broker, and to act in good faith to accomplish the sale of the Property by, among other things, making the Property available for showing at reasonable times and, subject to paragraph 3F, referring to Broker all inquiries of any party interested in the Property. Seller is responsible for determining at what price to list and sell the Property.
- E. **Investigations and Reports:** Seller agrees, within 5 (or _____) Days of the beginning date of this Agreement, to order and, when required by the service provider, pay for a Natural Hazard Disclosure report and the following reports:
☐ Structural Pest Control, ☐ General Property Inspection, ☐ Homeowners Association Documents, ☐ Preliminary (Title) Report, ☐ Roof Inspection, ☐ Pool Inspection, ☐ Septic/Sewer Inspection, ☐ Other _____.
 If Property is located in a Common Interest Development or Homeowners Association, Seller is advised that there may be benefits to obtaining any required documents prior to entering into escrow with any buyer. Such benefits may include, but not be limited to, potentially being able to lower costs in obtaining the documents and avoiding any potential delays or complications due to late or slow delivery of such documents.
- F. Seller further agrees to indemnify, defend and hold Broker harmless from all claims, disputes, litigation, judgments, attorney fees and costs arising from any incorrect or incomplete information supplied by Seller, or from any material facts that Seller knows but fails to disclose including dangerous or hidden conditions on the Property.
11. **DEPOSIT:** Broker is authorized to accept and hold on Seller's behalf any deposits to be applied toward the purchase price.



FIGURE 6.1: Exclusive Authorization and Right To Sell (continued)

Property Address: _____

12. AGENCY RELATIONSHIPS:

- A. DISCLOSURE:** The Seller acknowledges receipt of a ☒ "Disclosure Regarding Real Estate Agency Relationships" (C.A.R. Form AD).
- B. SELLER REPRESENTATION:** Broker shall represent Seller in any resulting transaction, except as specified in paragraph 3F.
- C. POSSIBLE DUAL AGENCY WITH BUYER:** Depending upon the circumstances, it may be necessary or appropriate for Broker to act as an agent for both Seller and buyer, exchange party, or one or more additional parties ("Buyer"). Broker shall, as soon as practicable, disclose to Seller any election to act as a dual agent representing both Seller and Buyer. If a Buyer is procured directly by Broker or an associate-licensee in Broker's firm, Seller hereby consents to Broker acting as a dual agent for Seller and Buyer. In the event of an exchange, Seller hereby consents to Broker collecting compensation from additional parties for services rendered, provided there is disclosure to all parties of such agency and compensation. Seller understands and agrees that: a dual agent may not, without the express permission of the respective party, disclose to the other party confidential information, including, but not limited to, facts relating to either the Buyer's or Seller's financial position, motivations, bargaining position, or other personal information that may impact price, including the Seller's willingness to accept a price less than the listing price or the Buyer's willingness to pay a price greater than the price offered; and except as set forth above, a dual agent is obligated to disclose known facts materially affecting the value or desirability of the Property to both parties.
- D. CONFIRMATION:** Broker shall confirm the agency relationship described above, or as modified, in writing, prior to or concurrent with Seller's execution of a purchase agreement.
- E. POTENTIALLY COMPETING SELLERS AND BUYERS:** Seller understands that Broker may have or obtain listings on other properties, and that potential buyers may consider, make offers on, or purchase through Broker, property the same as or similar to Seller's Property. Seller consents to Broker's representation of sellers and buyers of other properties before, during and after the end of this Agreement. Seller acknowledges receipt of a ☒ "Possible Representation of More than One Buyer or Seller - Disclosure and Consent" (C.A.R. Form PRBS).
- 13. SECURITY, INSURANCE, SHOWINGS, AUDIO AND VIDEO:** Broker is not responsible for loss of or damage to personal or real property, or person, whether attributable to use of a keysafe/lockbox, a showing of the Property, or otherwise. Third parties, including, but not limited to, appraisers, inspectors, brokers and prospective buyers, may have access to, and take videos and photographs of, the interior of the Property. Seller agrees: (i) to take reasonable precautions to safeguard and protect valuables that might be accessible during showings of the Property; (ii) to obtain insurance to protect against these risks. Broker does not maintain insurance to protect Seller. Persons visiting the Property may not be aware that they could be recorded by audio or visual devices installed by Seller (such as "nanny cams" and hidden security cameras). Seller is advised to post notice disclosing the existence of security devices.
- 14. PHOTOGRAPHS AND INTERNET ADVERTISING:**
- A.** In order to effectively market the Property for sale it is often necessary to provide photographs, virtual tours and other media to buyers. Seller agrees (or ☐ if checked, does not agree) that Broker or others may photograph or otherwise electronically capture images of the exterior and interior of the Property ("Images") for static and/or virtual tours of the Property by buyers and others for use on Broker's website, the MLS, and other marketing materials and sites. Seller acknowledges that if Broker engages third parties to capture and/or reproduce and display Images, the agreement between Broker and those third parties may provide such third parties with certain rights to those Images. The rights to the Images may impact Broker's control or lack of control of future use of the Images. If Seller is concerned, Seller should request that Broker provide any third parties' agreement impacting the Images. Seller also acknowledges that once Images are placed on the Internet neither Broker nor Seller has control over who can view such Images and what use viewers may make of the Images, or how long such Images may remain available on the Internet. Seller further assigns any rights in all Images to the Broker/Agent and agrees that such Images are the property of Broker/Agent and that Broker/Agent may use such Images for advertising, including post sale and for Broker/Agent's business in the future.
- B.** Seller acknowledges that prospective buyers and/or other persons coming onto the property may take photographs, videos or other images of the property. Seller understands that Broker does not have the ability to control or block the taking and use of Images by any such persons. (If checked) ☐ Seller instructs Broker to publish in the MLS that taking of Images is limited to those persons preparing Appraisal or Inspection reports. Seller acknowledges that unauthorized persons may take images who do not have access to or have not read any limiting instruction in the MLS or who take images regardless of any limiting instruction in the MLS. Once Images are taken and/or put into electronic display on the Internet or otherwise, neither Broker nor Seller has control over who views such Images nor what use viewers may make of the Images.
- 15. KEYSAFE/LOCKBOX:** A keysafe/lockbox is designed to hold a key to the Property to permit access to the Property by Broker, cooperating brokers, MLS participants, their authorized licensees and representatives, authorized inspectors, and accompanied prospective buyers. Seller further agrees that Broker, at Broker's discretion, and without further approval from Seller, shall have the right to grant access to and convey Seller's consent to access the Property to inspectors, appraisers, workers, repair persons, and other persons requiring entry to the Property in order to facilitate the sale of the Property. Broker, cooperating brokers, MLS and Associations/Boards of REALTORS® are not insurers against injury, theft, loss, vandalism or damage attributed to the use of a keysafe/lockbox.
- A.** Seller does (or if checked ☐ does not) authorize Broker to install a keysafe/lockbox.
- B. TENANT-OCCUPIED PROPERTY:** If Seller does not occupy the Property, Seller shall be responsible for obtaining occupant(s)' written permission for use of a keysafe/lockbox (C.A.R. Form KLA).
- 16. SIGN:** Seller does (or if checked ☐ does not) authorize Broker to install a FOR SALE/SOLD sign on the Property.
- 17. EQUAL HOUSING OPPORTUNITY:** The Property is offered in compliance with federal, state and local anti-discrimination laws.
- 18. ATTORNEY FEES:** In any action, proceeding or arbitration between Seller and Broker to enforce the compensation provisions of this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs from the non-prevailing Seller or Broker, except as provided in paragraph 22A.

- 19. ADDITIONAL TERMS:** ☐ REO Advisory Listing (C.A.R. Form REOL) ☐ Short Sale Information and Advisory (C.A.R. Form SSIA)
- ☐ Trust Advisory (C.A.R. Form TA)
- ☐ Seller intends to include a contingency to purchase a replacement property as part of any resulting transaction
- _____
- _____
- _____



FIGURE 6.1: Exclusive Authorization and Right To Sell (continued)

Property Address: _____

- 20. MANAGEMENT APPROVAL:** If an associate-licensee in Broker's office (salesperson or broker-associate) enters into this Agreement on Broker's behalf, and Broker or Manager does not approve of its terms, Broker or Manager has the right to cancel this Agreement, in writing, within **5 Days** After its execution.
- 21. SUCCESSORS AND ASSIGNS:** This Agreement shall be binding upon Seller and Seller's successors and assigns.
- 22. DISPUTE RESOLUTION:**
- A. MEDIATION:** Seller and Broker agree to mediate any dispute or claim arising between them regarding the obligation to pay compensation under this Agreement, before resorting to arbitration or court action. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party **(i)** commences an action without first attempting to resolve the matter through mediation, or **(ii)** before commencement of an action, refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. Exclusions from this mediation agreement are specified in paragraph 22B.
 - B. ADDITIONAL MEDIATION TERMS:** The following matters shall be excluded from mediation: **(i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code § 2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver or violation of the mediation provisions.**
 - C. ARBITRATION ADVISORY:** If Seller and Broker desire to resolve disputes arising between them through arbitration rather than court, they can document their agreement by attaching and signing an Arbitration Agreement (C.A.R. Form ARB).
- 23. ENTIRE AGREEMENT:** All prior discussions, negotiations and agreements between the parties concerning the subject matter of this Agreement are superseded by this Agreement, which constitutes the entire contract and a complete and exclusive expression of their agreement, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. This Agreement and any supplement, addendum or modification, including any photocopy or facsimile, may be executed in counterparts.
- 24. OWNERSHIP, TITLE AND AUTHORITY:** Seller warrants that: **(i)** Seller is the owner of the Property; **(ii)** no other persons or entities have title to the Property; and **(iii)** Seller has the authority to both execute this Agreement and sell the Property. Exceptions to ownership, title and authority are as follows: _____

- ☐ **REPRESENTATIVE CAPACITY:** This Listing Agreement is being signed for Seller by an individual acting in a Representative Capacity as specified in the attached Representative Capacity Signature Disclosure (C.A.R. Form RCSD-S). Wherever the signature or initials of the representative identified in the RCSD appear on this Agreement or any related documents, it shall be deemed to be in a representative capacity for the entity described and not in an individual capacity, unless otherwise indicated. Seller **(i)** represents that the entity for which the individual is signing already exists and **(ii)** shall Deliver to Broker, within 3 Days After Execution of this Agreement, evidence of authority to act (such as but not limited to: applicable trust document, or portion thereof, letters testamentary, court order, power of attorney, resolution, or formation documents of the business entity).

By signing below, Seller acknowledges that Seller has read, understands, received a copy of and agrees to the terms of this Agreement.

Seller _____ Date _____
 Address _____ City _____ State _____ Zip _____
 Telephone _____ Fax _____ E-mail _____

Seller _____ Date _____
 Address _____ City _____ State _____ Zip _____
 Telephone _____ Fax _____ E-mail _____

☐ Additional Signature Addendum attached (C.A.R. Form ASA)

Real Estate Broker (Firm) _____ DRE Lic.# _____
 Address _____ City _____ State _____ Zip _____
 By _____ Tel. _____ E-mail _____ DRE Lic.# _____ Date _____
 By _____ Tel. _____ E-mail _____ DRE Lic.# _____ Date _____

☐ Two Brokers with different companies are co-listing the Property. Co-listing Broker information is on the attached Additional Broker Acknowledgement (C.A.R. Form ABA).

© 2021 California Association of REALTORS®, Inc. United States copyright law (Title 17 U.S. Code) forbids the unauthorized distribution, display and reproduction of this form, or any portion thereof, by photocopy machine or any other means, including facsimile or computerized formats. THIS FORM HAS BEEN APPROVED BY THE CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.). NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OR ACCURACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE TRANSACTIONS. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL. This form is made available to real estate professionals through an agreement with or purchase from the California Association of REALTORS®. It is not intended to identify the user as a REALTOR®. REALTOR® is a registered collective membership mark which may be used only by members of the NATIONAL ASSOCIATION OF REALTORS® who subscribe to its Code of Ethics.

Published and Distributed by:
 REAL ESTATE BUSINESS SERVICES, LLC.
 a subsidiary of the California Association of REALTORS®
 525 South Virgil Avenue, Los Angeles, California 90020

RLA REVISED 6/21 (PAGE 5 OF 5)



RESIDENTIAL LISTING AGREEMENT - EXCLUSIVE (RLA PAGE 5 OF 5)

While owners usually cannot cancel an exclusive listing without obligation, courts have held that an owner may properly cancel an exclusive listing if the agent has failed in the duty to use good-faith efforts to procure a buyer.

There are two types of exclusive sale listings: exclusive right-to-sell listings and exclusive agency listings.

Exclusive authorization and right-to-sell listing With an **exclusive authorization and right-to-sell listing**, the owner agrees to pay a commission to an agent if the agent, any other agent, or the owner procures a buyer in accordance with the price and terms of the listing, or for any other price or terms that the owner accepts. The broker will not be entitled to a commission if the buyer located lacks the financial ability to complete the purchase because the broker has failed to procure a ready, willing, and able buyer.

Because the listing agent earns a commission no matter who sells the property, this is the most desirable listing for brokers.

Exclusive right-to-sell listings frequently contain a **safety clause**. This clause customarily provides that the owner is obligated to pay a commission if a sale is made within a stated period after expiration of the listing to any person the agent negotiated with and whose name was furnished in writing to the owner within three days after the expiration of the listing. Sometimes, these clauses provide that in the event another listing is entered into, the owner no longer is obligated under the safety clause. Without such an exception, an owner could be obligated to pay more than one commission. Notice the safety clause, paragraph 3.A.2, in the listing agreement (Figure 6.1). Often the rules of a local board of REALTORS® have the effect of a safety clause on subsequent listings.

Paragraph 12 covers keybox authorization. The broker is not liable for any loss resulting from the use of the lockbox. If an agent recommends a keybox without any warnings to the owner, the agent could conceivably be held liable for any resulting loss.

Exclusive agency listing Under an **exclusive agency listing**, the named broker is the exclusive agent for the owner, and if the listing broker or any other agent procures a purchaser in accordance with the terms of the listing, or any other price and terms the owner might agree to, the agent has earned a commission. The owner can, however, sell the property without the assistance of the agent and without any obligation to pay a commission.

Exclusive agency listings usually are entered into when an owner might have one or more prospective buyers. A better arrangement, however, would be to write an exclusive right-to-sell listing that excludes named individuals for a set period. This would encourage the seller's prospects to buy if they are serious buyers. After the expiration of the stated period, the exception would be removed.

Exclusive agency listings usually require that the owner notify the agent of any sale and identify the purchasers. They usually also prohibit the owner from offering the property at a lower price than that offered by the agent.

Under an exclusive agency listing, the owner might be encouraged to subvert the agent's efforts. Problems arise as to who really was the procuring cause of a sale when the agent had contact with the owner's buyer (procuring cause is discussed further in "Procuring Cause" in this unit). Because of the possible problems of exclusive agency listings, many brokers refuse to accept them.

Open Listings

Open listings are nonexclusive listings; they may be offered to one or more brokers. The broker who earns the commission is the first agent to bring the owner an offer that meets the terms of the listing or that the owner accepts. A sale under one open listing automatically cancels all other open listings. The principal has no duty to notify the agents under other open listings of the sale.

An open listing may be simply a note or a memorandum that describes the property and states the price wanted and that a stated commission will be paid. The agent need not sign the open listing, but it must be signed by the principal (property owner).

The open listing is really a unilateral contract. The agent makes no promise to use diligence to obtain a buyer. By procuring a buyer, the agent accepts the owner's promise to pay a commission.

Unlike exclusive listings, open listings need not have a definite termination date. An owner generally can cancel the open listing at any time without obligation but cannot cancel an open listing to avoid paying a commission and then accept the benefits of the agent's efforts by consummating a sale to a buyer procured by the agent. An owner who cancels an open listing in good faith is not obligated to the agent simply because a sale later was made to a buyer the agent had contacted.

Open listings often lead to disagreements between owners and agents, as well as among agents over who was the procuring cause of a sale. Several legal form providers offer open listing forms. An advantage of a formal listing is the broker protection of the safety clause.

Procuring Cause

The agent who is the **procuring cause** of a sale is that agent who initiated an uninterrupted series of events that led to the sale. Under open listings and exclusive agency listings, an agent who was the procuring cause of the sale is entitled to a commission.

If a break in the chain of events occurred, such as failure to contact a prospective buyer for several months or failure to obtain financing, the original agent who failed for lack of diligence or effort generally would not be considered the procuring cause. Simply telling a person about a property or giving a buyer a list in which a property is included would not qualify an agent as a procuring cause.

CASE STUDY In the case of *Coldwell Banker and Co. v. Pepper Tree Office Center Assocs.* (1980) 106 C.A.3d 272, the plaintiff had an exclusive agency listing. The court held that submitting a one-page brochure and forwarding floor plans to the broker of a prospective tenant did not reasonably constitute procuring cause.

The agent who claims to be the procuring cause has the burden of proof. When the broker's efforts led directly to the buyer and the seller getting together, the courts generally will consider the broker to have been the procuring cause.

Procuring cause problems often arise when prospective buyers fail to inform an agent that they have already been exposed to a particular property by another agent. An agent who discovers after a sale that the buyers had previous contact with another agent should have the buyers make a written statement about the nature of the contact and the dates, as well as the reason the buyers did not continue to negotiate with the original agent. If this statement shows that another agent might have a reasonable claim to being the procuring cause, the selling agent should consider negotiating a fair settlement.

An owner may assume, unless notified otherwise, that the broker presenting the offer is the procuring cause.

The safety clause in a listing appears only to require that the agent introduced the buyers to the property. This is much less than the requirement under procuring cause. Therefore, a broker could be in a better position claiming notification under the safety clause than making a claim as to procuring cause. A prior offer made by the ultimate purchaser has been held to satisfy the notification requirements of the safety clause.

Oral Listings

While listings of real property are required to be in writing to be enforceable, one exception may exist. If, after a listing expires, the owners encourage the broker to continue to work on the sale of the property, the owners may have waived their rights to claim the statute of frauds as a defense against paying a commission. The doctrine of estoppel might apply.

See *Filante v. Kikendall* (1955) 134 C.A.2d 695 for an example.

Buyer Listings

As discussed earlier, the agent can represent the buyer only rather than the seller. A **buyer listing**, like a listing from owners, can be exclusive: the broker has the sole right to locate property for the buyers. In a buyer exclusive agency listing, the buyers can locate property for themselves, but the broker is the exclusive agent. In an open buyer listing, the broker is given nonexclusive authorization to locate property.

Like a seller's listing, a buyer's listing, to be enforceable, must be in writing and signed to satisfy the statute of frauds. An oral agreement by a buyer to pay a commission is unenforceable.

Like a seller's listing, a buyer's listing would authorize the broker to cooperate with other brokers. The terms in the buyer's listing are very similar to those found in the usual listings given by owners. One difference is the fee structure. Buyers' listings for residential property generally provide that the buyer will pay the agent's commission; however, any commission paid to the agent by third parties (commission splits) will be credited against the fee owed by the buyer. Buyers' listings frequently provide for a fee for obtaining an option to purchase and another fee when exercised. Buyers' listings sometimes include provision for an hourly fee, as well as an advance against expenses.

CASE STUDY In the case of *Schaffter v. Creative Capital Leasing Group LLC* (2008) 166 C.A. 4th 745, a buyer agency listing provided for a 2.3% commission less fees paid to the broker by the developer. The buyer purchased 16 units, and the broker received \$89,000 from the developer. He was still owed \$38,400 when the buyer defaulted and refused to close on the remaining units. The agent sued the buyer.

The trial court ruled that the commission was earned when the contract was entered into. Because the buyer defaulted, the broker was entitled to the full remaining commission on all units totaling \$147,000, as well as attorney fees. The Court of Appeal affirmed.

Note: The buyer expected the units to appreciate in value before closing and apparently intended to default on units that did not appreciate.

Net Listings

Net listings refer to the commission payment only and provide that all money received over a stated or net amount will be the agent's commission. They are illegal in many states because they create a serious conflict of interest. The agent under a net listing really is dealing more as a principal than as an agent. The agent is closer to being an optionee (with an option to buy) than a representative of the owner.

Even though net listings are legal in California, agents should be aware that the seller is likely to allege fraud or misrepresentation should the sales price result in a commission that is greater than customary.

A net listing does not relieve the broker from informing the owner of offers at or less than the list price. When an owner accepts such an offer, the broker is not entitled to a commission.

The agent must disclose the amount of the net commission before or at the time the principal commits to the transaction. Failure to do so could be grounds for disciplinary action.

Because of the ethical problems involved with net listings, a net listing form has not been included in this unit.

Other Listing Forms

Advance fee addendum The growth of professionalism in real estate has led to a slowly growing acceptance of advance fees. While more common in buyer listings, they are gaining acceptance in seller listings, especially listings involving larger residential, commercial, or industrial property where a great deal of professional effort and expense will be required before a sale.

The **advance fee addendum** usually sets forth specific activities that the agent is to be compensated for, as well as an hourly rate (or set rate) for the compensation. The agreement is very similar to an agreement that an attorney makes with his or her client.

The Department of Real Estate requires approval of all advance fee forms (approval does not extend to photocopies of approved forms). Any additions or deletions to an approved form must be submitted to the Department of Real Estate at least 10 days before entering into an agreement. Failure to do so could result in disciplinary action.

Advance fees must be placed in the broker's trust account until they are earned.

Advance costs **Advance costs** differ from advance fees in that they are paid to the agent to cover cash outlays in carrying out the agency. They are not intended to cover brokerage fees or general overhead expenses. As an example, if an owner wanted an expensive ad in the *Wall Street Journal*, the broker might require cost in advance.

Monies collected to cover advance costs must be treated as trust money and must be placed in the broker's trust account. The trust fund remains the property of the principal until disbursed by the agent for the principal.

The broker must provide the principal with a quarterly accounting of all disbursements, and any remaining funds must be returned to the principal at the expiration of the agreement along with a final accounting.

Listing modification While it is possible for a broker and a principal to enter into a new listing agreement that by its terms supersedes an existing listing, it is far simpler to enter a simple modification. Brokers can use an all-purpose addendum form or a specific listing addendum form for this purpose.

Loan broker listing agreement A mortgage loan broker represents a borrower, as his or her agent, to obtain a loan. The agency agreement setting forth the rights and obligations of the parties is known as a **loan broker listing agreement**.

Loan brokers' commissions and costs on regulated loans are limited by law.

A loan broker listing agreement generally allows the broker to work with other agents, provides a safety clause pertaining to loans made after the expiration of the listing, and contains other provisions that are similar to those found in exclusive right-to-sell listings.

Seller's net Often, sellers do not understand the effect of escrow costs, prorations, prepayment penalties, title insurance costs, seller's points, and other matters. Surprises can result when sellers refuse to sell, file a complaint against the agent, and even sue the agent.

Estimated Seller's Net Sheet forms allow the agent to estimate the seller's actual net after loans, liens, costs, and fees are deducted from the sale price. An Estimated Seller's Net Sheet form can be used at the time a listing is taken, when an offer is received, or in preparing a counteroffer. The more open agents are in their dealings, the less chance they have of creating animosity and/or being sued by a party to a transaction.

OPTIONS

As pointed out in Unit 5, an option is a contract to make a contract. The option must clearly show the price if the option is exercised. (The price can be determined by a formula; however, it cannot be ambiguous.) Time is considered to be of the essence in options in that the option *must* be exercised within the period provided.

Generally, option-to-purchase forms provide for the method of exercising the option, include any agreed-on sales terms, and contain provisions for escrow and delivery of title, as well as for brokerage fees. The form in Figure 6.2 protects the broker during any extensions to the option, as well as for a safety period of one year after the expiration of the option or extensions thereto. Some option forms provide for option extensions upon the payment of additional consideration.

An owner cannot avoid a commission by giving an option during the listing period that is to be exercised after the listing expires. See *Anthony v. Enzler* (1976) 61 C.A.3d 872.

CASE STUDY The case of *Patel v. Liebermensch* (2008) 45 C. 4th 344 involved a lease with a purchase option. The lessees notified the owner that they wished to exercise their purchase option. The owners sent a contract with a 90-day escrow. Lessees demanded a 30-day escrow. The owner maintained that the option was not valid because there was no meeting of the minds as to the escrow period or method of payment. The trial court ruled that terms were sufficiently clear and ordered specific performance.

The Court of Appeal reversed, ruling that there was no meeting of the minds so the option could not be exercised.

The Supreme Court reinstated the trial court order and held that failure to state a time period for close of escrow was not a fatal flaw. It could be implied in an option that escrow should close within a reasonable period of time.

FIGURE 6.2: Standard Option to Purchase Form

STANDARD OPTION TO PURCHASE Irrevocable Right-to-Buy											
<p>NOTE: This form is used by a leasing or sales agent when offers to rent or buy a property include a purchase option exercisable without extensions, to prepare an option as an irrevocable offer to sell with a price and terms for payment exercisable during a single period as an attachment to a lease agreement or an offer to grant an option.</p>											
<p>DATE: _____, 20____, at _____, California.</p> <p><i>Items left blank or unchecked are not applicable.</i></p>											
<p>1. OPTION MONEY:</p> <p>Optionor herewith receives from Optionee option money in the amount of \$_____, evidenced by: cash, check, or _____, given in consideration for this option to purchase real property.</p>											
<p>2. REAL PROPERTY UNDER OPTION:</p> <p>Address _____ Legal description/Assessor's parcel number _____</p>											
<p>3. ADDITIONAL CONSIDERATION:</p> <p>As further consideration for this option, Optionee is to obtain at their expense and deliver to Optionor prior to expiration % of this option the following checked items regarding the property:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%;">Property survey report by licensed California surveyors</td> <td style="width: 50%;">Off-site improvement plans</td> </tr> <tr> <td>Architectural plans and specifications</td> <td>Soil engineer's report</td> </tr> <tr> <td>On-site engineering plans</td> <td>Land use study</td> </tr> <tr> <td>Zoning ordinance request</td> <td>Application for a conditional use permit</td> </tr> <tr> <td>Application for a parcel map or waiver</td> <td>_____</td> </tr> </table>		Property survey report by licensed California surveyors	Off-site improvement plans	Architectural plans and specifications	Soil engineer's report	On-site engineering plans	Land use study	Zoning ordinance request	Application for a conditional use permit	Application for a parcel map or waiver	_____
Property survey report by licensed California surveyors	Off-site improvement plans										
Architectural plans and specifications	Soil engineer's report										
On-site engineering plans	Land use study										
Zoning ordinance request	Application for a conditional use permit										
Application for a parcel map or waiver	_____										
<p>4. OPTION PERIOD:</p> <p>Optionor hereby grants to Optionee the irrevocable option to purchase the Optionor's right, title and interest in the property on the terms stated, for a period commencing with the acceptance of this option and expiring _____, 20____, or on termination of Optionee's leasehold interest in the property.</p>											
<p>5. EXERCISE OF OPTION:</p> <p>Optionee may exercise this option during the option period by:</p> <p>5.1 Signing escrow instructions identical in provisions to those attached as Exhibit A and delivering the instructions to escrow [See RPI Form 401];</p> <p>5.2 Depositing cash in escrow of \$_____; and</p> <p>5.3 Delivering an escrow-certified copy of the signed escrow instructions to Optionor within the option period, in person or by both certified and regular mail.</p>											
<p>6. ESCROW CONTRACT:</p> <p>In the event this option is exercised, the transaction will be escrowed with _____.</p> <p>6.1 Escrow will close within _____ days after exercise.</p>											
<p>7. DELIVERY OF TITLE:</p> <p>On Optionee's exercise of this option, Optionor will timely place all documents and instruments into escrow required of the Optionor as necessary for escrow to close as scheduled.</p>											
<p>8. BROKERAGE FEE:</p> <p>Optionor agrees to pay a brokerage fee of \$_____, or _____% of the selling price, IF:</p> <p>8.1 This option is exercised;</p> <p>8.2 Within one year after expiration of option period and any extension or renewal, Optionor enters into an agreement to option, sell, lease or exchange with Optionee, or their assigns or successors; or</p> <p>8.3 Optionor wrongfully prevents the exercise of this option:</p> <p>8.4 Fee payable to Broker(s) _____,</p> <p>8.5 Optionor and Optionee acknowledge receipt of the Agency Law Disclosure. [See RPI Form 305]</p>											
<p>9. SALE TERMS:</p> <p>Price of \$_____ payable as follows:</p> <p>9.1 All cash.</p> <p>9.2 Cash down payment in the amount of \$_____.</p> <p>9.3 Take title subject to, or Assume, an existing first trust deed note held by _____, with an unpaid principal balance of \$_____, payable \$_____ monthly, including interest not exceeding _____%, ARM, type _____, plus a monthly tax/insurance impound payment of \$_____.</p> <p>a. At closing, loan balance differences per beneficiary statement(s) to be adjusted into: cash, carryback note, or sales price. [See RPI Form 415]</p> <p>b. The impound account to be transferred: charged, or without charge, to Optionee.</p>											

FIGURE 6.2: Standard Option to Purchase Form (continued)

----- PAGE 2 OF 2 — FORM 161 -----

9.4 Take title subject to, or Assume, an existing second trust deed note held by _____, with an unpaid principal balance of \$_____, payable \$_____ monthly, including interest not exceeding _____%, ARM, type _____, due _____, 20_____.

9.5 A note for the balance of the purchase price in the amount of \$_____ to be executed by Optionee in favor of Optionor and secured by a trust deed on the property junior to the above referenced financing, payable \$_____ monthly, or more, beginning one month after closing, including interest at _____% per annum from closing, due _____ years after closing.

a. This note and trust deed to contain provisions to be provided by Optionor for:
 due-on-sale, prepayment penalty, late charges, _____

b. The attached Financial Disclosure Statement is an addendum to this agreement (mandatory on four-or-less residential units). [See **RPI** Form 300]

c. Optionee to provide a Request for Notice of Default and Notice of Delinquency to senior encumbrancers. [See **RPI** Form 412]

10. GENERAL PROVISIONS:

10.1 See attached addendum for additional provisions. [See **RPI** Form 250]

10.2 Attached as addenda are the following checked disclosures mandated on four-or-less residential units:

a. Condition of Property Disclosure — Transfer Disclosure Statement (TDS) [See **RPI** Form 304]

b. Natural Hazard Disclosure Statement [See **RPI** Form 314]

c. Disclosure of Sexual Predator Database [See **RPI** Form 319]

d. Hazard Disclosure Booklet, and related Optionor disclosures, containing Environmental Hazards, Lead-based Paint and Earthquake Safety [See **RPI** Forms 313 and 315]

e. Documentation on any Homeowners' Association (HOA) involved. [See **RPI** Form 309]

f. Notice of Supplemental Property Tax Bill [See **RPI** Form 317]

10.3 Possession of the property to be delivered on:
 close of escrow, or see attached Occupancy Agreement. [See **RPI** Forms 271 and 272]

10.4 Both parties reserve their rights to assign, and agree to cooperate in effecting an Internal Revenue Code §1031 exchange prior to close of escrow, on either party's written notice.

11. EXPIRATION OF OPTION:

This offer to sell will be deemed expired if not accepted by exercise during the option period.

11.1 This option contract will automatically terminate by expiration on _____, 20_____.

Optionor's Broker: _____ Broker's DRE #: _____ is the broker for: Seller both Buyer and Seller (dual agent) Seller's Agent: _____ Agent's DRE #: _____ is Optionor's agent (salesperson or broker-associate) both Optionee's and Optionor's agent (dual agent) Signature: _____ Address: _____ Phone: _____ Cell: _____ Email: _____	Optionee's Broker: _____ Broker's DRE #: _____ is the broker for: Buyer both Buyer and Seller (dual agent) Buyer's Agent: _____ Agent's DRE #: _____ is Optionee's agent (salesperson or broker-associate) both Optionee's and Optionor's agent (dual agent) Signature: _____ Address: _____ Phone: _____ Cell: _____ Email: _____
I hereby grant this option and agree to the terms stated above. Date: _____, 20_____ Optionor: _____ Signature: _____ Signature: _____ Address: _____ Phone: _____ Fax: _____ Email: _____	I hereby accept this option and agree to the terms stated above. Date: _____, 20_____ Optionee: _____ Signature: _____ Signature: _____ Address: _____ Phone: _____ Fax: _____ Email: _____

FORM 161
01-19
©2019 **RPI** — Realty Publications, Inc., P.O. BOX 5707, RIVERSIDE, CA 92517

As discussed in Unit 3, in California, an agent with a listing may also obtain an option to purchase the property. However, because the broker is dealing as an agent under the listing and as a principal under the option, a serious conflict of interest arises. As previously stated, before the option can be exercised, the agent must fully disclose whether she has an offer, the amount of the offer, and her profit. The agent also must obtain the owner's written consent after said disclosure to exercise the option.

Because of the serious ethical questions raised by options combined with listings, the authors strongly advise against the use of these agreements.

CASE STUDY The case of *Rattray v. Scudder* (1946) 28 C.2d 214 involved a listing-option agreement. The broker located a buyer but indicated to the owner that he was unable to find one. He then negotiated a lower purchase price for himself. The court held that a broker, when pursuing his own interests, cannot ignore those of his principal. The broker cannot be allowed to enjoy the fruits of an advantage taken under a fiduciary relationship.

BROKER'S FORMS

Finder's Fee

An agent may not pay a commission to an unlicensed party for any act that requires a real estate license. Finders' fees, however (discussed in Unit 3), are legal. They are not paid for an act requiring a real estate license; they are paid for a referral or introduction to a buyer, seller, borrower, or lender. Sharing part of a sales commission with an unlicensed person nevertheless is illegal.

Oral agreements made with brokers have been enforced on the theory that the broker does not need the protection of the statute of frauds. For the protection of both the broker and the finder, a written agreement should be prepared.

Generally, in finder's fee agreements, the finder agrees not to participate in or conduct negotiations with prospective clients or to solicit loans on behalf of prospective clients.

Cooperating Broker Agreements

Agreements between brokers to split commissions are not required by the statute of frauds to be in writing. They deal in dollars and not real estate.

To avoid misunderstandings, brokers may enter into written agreements setting forth the commission split. Some **cooperating broker fee agreements** require that the nonlisting broker identify prospective buyers so that the listing broker can notify the owner of these prospective purchasers (to be protected under the safety clause of the listing). Brokers seldom use these agreements, however, because generally both listing and selling brokers are members of a trade group, such as a multiple listing service, that enforces commission split agreements.

REAL ESTATE PURCHASE AGREEMENT

The California Association of REALTORS® (CAR) has prepared several real estate purchase contract forms. We have included a California Residential Purchase Agreement and Joint Escrow Instructions as Figure 6.3. This form provides for most contingencies and avoids the necessity of agent-drafted provisions that might not clearly reflect the intentions of the parties. The form also serves as joint escrow instructions. Included here are comments on the paragraphs to aid in your understanding of the purpose and applications of the provisions of this contract.

Paragraph 1: Defines the form as an offer from the offeror, describes the property, and indicates purchase terms are set forth later. The paragraph points out that brokers and agents are not parties to this agreement.

Paragraph 2: Reiterates the agency disclosure and confirms the agency of the listing and selling agent. It also includes a disclosure and consent as to possible dual representation.

Paragraph 3: Terms of purchase and allocation costs. The contractual terms are covered in Subparagraphs A through R.

Paragraph 4: Property addenda and advisories.

Subparagraph A. By checking the appropriate box, you can identify the type of property.

Subparagraph B. This allows other addendums to be incorporated by reference.

Subparagraph C. By checking, various advisories are provided for reference purposes but are not incorporated into this agreement.

Paragraph 5: Additional terms affecting purchase price.

Subparagraph A. Provides for delivery of deposit, deposit increases, and forfeiture, should the buyer default.

Subparagraph B. Provides for an all-cash offer.

Subparagraph C. Provides for required loans.

Subparagraph D. Provides for payment of the balance of the purchase price.

Subparagraph E. Covers any limit on credit to buyer.

Paragraph 6: Additional financing terms.

Subparagraph A. Covers verification of down payment and closing costs.

Subparagraph B. Covers verification of the loan application.

Subparagraph C. Points out that the seller is relying on the buyer's representation as to financing arranged.

Paragraph 7: Closing and possession.

Subparagraph A. Covers the condition of property and if the buyer intends to occupy it as a permanent residence (limits liquidated damages).

Subparagraph B. Property is to be delivered “as is” and shall be maintained until delivery. The buyer is advised to investigate property as to present condition.

Subparagraph C. Covers sellers remaining in possession after closing. The buyer is advised to check with insurance providers as well as an attorney as to liability and documentation to be used.

Subparagraph D. All warranty rights are to be assigned to buyer.

Subparagraph E. All keys, openers, and codes are to be provided to buyer.

Paragraph 8: Contingencies and the removal of contingencies.

Subparagraph A. Buyer cannot cancel for failure to qualify for a loan. If no loan contingency is checked, then it is not a contingency.

Subparagraph B. The appraisal contingency is only related to value.

Subparagraph C. Offer is contingent on buyer’s acceptance of property condition.

Subparagraph D. Offer is contingent on review of seller’s documents.

Subparagraph E. Offer is contingent on buyer’s ability to obtain title insurance.

Subparagraph F. Offer is contingent on buyer’s review of common interest disclosures.

Subparagraph G. Offer is contingent on buyer’s acceptance of leases, service contracts, and other financial obligations.

Subparagraph H. If buyer removes contingency, buyer waives rights.

Subparagraph I. Buyer must either waive contingency right or cancel.

Subparagraph J. Unless another sale of property is checked, it is not a contingency.


Paragraph 9: Items included in and excluded from sale. It provides for what does or does not go with the sale.

Paragraph 10: Allocation of costs. This sets forth who is responsible for which costs.

Paragraph 11: Statutory and other disclosures. This covers all other required disclosures.

FIGURE 6.3: Residential Purchase Agreement

The following form is copyrighted by the California Association of REALTORS®, © 2021, and is reprinted under a limited license with permission. Photocopying or any other reproduction, whether electronic or otherwise, is strictly prohibited.



**CALIFORNIA RESIDENTIAL PURCHASE AGREEMENT
AND JOINT ESCROW INSTRUCTIONS**
(C.A.R. FORM RPA, 12/21)

Date Prepared: _____

1. **OFFER:**

A. **THIS IS AN OFFER FROM** _____ (“Buyer”).

B. **THE PROPERTY** to be acquired is _____, situated in _____ (City), _____ (County), California, _____ (Zip Code), Assessor’s Parcel No(s) _____ (“Property”).
(Postal/Mailing address may be different from city jurisdiction. Buyer is advised to investigate.)

C. **THE TERMS OF THE PURCHASE ARE SPECIFIED BELOW AND ON THE FOLLOWING PAGES.**

D. Buyer and Seller are referred to herein as the “Parties.” Brokers and Agents are **not** Parties to this Agreement.

2. **AGENCY:**

A. **DISCLOSURE:** The Parties each acknowledge receipt of a “Disclosure Regarding Real Estate Agency Relationships” (C.A.R. Form AD) if represented by a real estate licensee. Buyer’s Agent is not legally required to give to Seller’s Agent the AD form Signed by Buyer. Seller’s Agent is not legally obligated to give to Buyer’s Agent the AD form Signed by Seller.

B. **CONFIRMATION:** The following agency relationships are hereby confirmed for this transaction.

Seller’s Brokerage Firm _____ License Number _____

Is the broker of (check one): ☐ the Seller; or ☐ both the Buyer and Seller (Dual Agent).

Seller’s Agent _____ License Number _____

Is (check one): ☐ the Seller’s Agent (Salesperson or broker associate); or ☐ both the Buyer’s and Seller’s Agent (Dual Agent).

Buyer’s Brokerage Firm _____ License Number _____

Is the broker of (check one): ☐ the Buyer; or ☐ both the Buyer and Seller (Dual Agent).

Buyer’s Agent _____ License Number _____

Is (check one): ☐ the Buyer’s Agent (Salesperson or broker associate); or ☐ both the Buyer’s and Seller’s Agent (Dual Agent).

C. ☐ More than one Brokerage represents ☐ Seller, ☐ Buyer. See, Additional Broker Acknowledgement (C.A.R. Form ABA).

D. **POTENTIALLY COMPETING BUYERS AND SELLERS:** The Parties each acknowledge receipt of a ☒ “Possible Representation of More than One Buyer or Seller - Disclosure and Consent” (C.A.R. Form PRBS).

3. **TERMS OF PURCHASE AND ALLOCATION OF COSTS:** The items in this paragraph are contractual terms of the Agreement. Referenced paragraphs provide further explanation. This form is 16 pages. The Parties are advised to read all 16 pages.

	Paragraph #	Paragraph Title or Contract Term	Terms and Conditions	Additional Terms
A	5, 5B (cash)	Purchase Price	\$ _____	<input type="checkbox"/> All Cash
B		Close Of Escrow (COE)	_____ Days after Acceptance OR on _____ (date)	
C	32A	Expiration of Offer	3 calendar days after all Buyer Signature(s) or _____ (date), at 5PM or <input type="checkbox"/> AM/ <input type="checkbox"/> PM	
D(1)	5A(1)	Initial Deposit Amount	\$ _____ (_____% of purchase price) (% number above is for calculation purposes and is not a contractual term)	within 3 (or _____) business days after Acceptance by wire transfer OR <input type="checkbox"/> _____
D(2)	5A(2)	<input type="checkbox"/> Increased Deposit (Money placed into escrow after the initial deposit. Use form DID at time increased deposit is made.)	\$ _____ (_____% of purchase price) (% number above is for calculation purposes and is not a contractual term)	Upon removal of all contingencies OR <input type="checkbox"/> _____ (date) OR <input type="checkbox"/> _____
E(1)	5C(1)	Loan Amount(s): First Interest Rate _____ Points _____ If FHA or VA checked, Deliver list of lender required repairs	\$ _____ (_____% of purchase price) Fixed rate or <input type="checkbox"/> Initial adjustable rate, not to exceed _____% Buyer to pay zero points or up to _____% of the loan amount 17 (or _____) Days after Acceptance	Conventional or, if checked, <input type="checkbox"/> FHA <input type="checkbox"/> VA (CAR Forms FVAC, HID attached) <input type="checkbox"/> Seller Financing <input type="checkbox"/> Other: _____
E(2)	5C(2)	Additional Financed Amount _____ Interest Rate _____ Points _____	\$ _____ (_____% of purchase price) Fixed rate or <input type="checkbox"/> Initial adjustable rate, not to exceed _____% Buyer to pay zero points or up to _____% of the loan amount	Conventional or, if checked, <input type="checkbox"/> Seller Financing <input type="checkbox"/> Other: _____
E(3)	7A	Occupancy Type	Primary, or if checked, <input type="checkbox"/> Secondary <input type="checkbox"/> Investment	
F	5D	Balance of Down Payment	\$ _____	
		PURCHASE PRICE TOTAL	\$ _____	

© 2021, California Association of REALTORS®, Inc.

RPA 12/21 (PAGE 1 OF 16)

Buyer’s Initials _____ / _____ Seller’s Initials _____ / _____



CALIFORNIA RESIDENTIAL PURCHASE AGREEMENT AND JOINT ESCROW INSTRUCTIONS (RPA PAGE 1 OF 16)

FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____ Date: _____

	Paragraph #	Paragraph Title or Contract Term	Terms and Conditions	Additional Terms
G(1)	5E	Seller Credit, if any, to Buyer	<input type="checkbox"/> \$ _____ (% number above is for calculation purposes and is not a contractual term)	Seller credit to be applied to closing costs OR <input type="checkbox"/> Other: _____
G(2)	ADDITIONAL FINANCE TERMS: _____			
H(1)	5B	Verification of All Cash (sufficient funds)	Attached to the offer or <input type="checkbox"/> 3 (or _____) Days after Acceptance	
H(2)	6A	Verification of Down Payment and Closing Costs	Attached to the offer or <input type="checkbox"/> 3 (or _____) Days after Acceptance	
H(3)	6B	Verification of Loan Application	Attached to the offer or <input type="checkbox"/> 3 (or _____) Days after Acceptance	
I	Intentionally Left Blank			
J	16	Final Verification of Condition	5 (or _____) Days prior to COE	
K	23	Assignment Request	17 (or _____) Days after Acceptance	
L	8	CONTINGENCIES	TIME TO REMOVE CONTINGENCIES	CONTINGENCY REMOVED
L(1)	8A	Loan(s)	17 (or _____) Days after Acceptance	<input type="checkbox"/> No loan contingency
L(2)	8B	Appraisal: Appraisal contingency based upon appraised value at a minimum of purchase price or <input type="checkbox"/> \$ _____	17 (or _____) Days after Acceptance	<input type="checkbox"/> No appraisal contingency Removal of appraisal contingency does not eliminate appraisal cancellation rights in FVAC.
L(3)	8C, 12	Investigation of Property Informational Access to Property Buyer's right to access the Property for informational purposes is NOT a contingency, does NOT create cancellation rights, and applies even if contingencies are removed.	17 (or _____) Days after Acceptance 17 (or _____) Days after Acceptance	REMOVAL OR WAIVER OF CONTINGENCY: Any contingency in L(1)-L(7) may be removed or waived by checking the applicable box above or attaching a Contingency Removal (C.A.R. Form CR) and checking the applicable box therein. Removal or Waiver at time of offer is against Agent advice. See paragraph 8H . <input type="checkbox"/> CR attached
L(4)	8D, 14A	Review of Seller Documents	17 (or _____) Days after Acceptance, or 5 Days after receipt, whichever is later	
L(5)	8E, 13A	Preliminary ("Title") Report	17 (or _____) Days after Acceptance or 5 Days after receipt, whichever is later	
L(6)	8F, 11K	Common Interest Disclosures required by Civil Code § 4525 or this Agreement	17 (or _____) Days after Acceptance, or 5 Days after receipt, whichever is later	
L(7)	8G, 9B(6)	Review of leased or liened items (Such as for solar panels or propane tanks or PACE or HERO liens)	17 (or _____) Days after Acceptance, or 5 Days after receipt, whichever is later	
L(8)	8J	Sale of Buyer's Property Sale of Buyer's property is not a contingency, UNLESS checked here: <input type="checkbox"/> C.A.R. Form COP attached		
M	Possession		Time for Performance	Additional Terms
M(1)		Time of Possession	Upon notice of recordation, OR <input type="checkbox"/> 6 PM or <input type="checkbox"/> AM/ <input type="checkbox"/> PM on date specified, as applicable, in 3M(2) or attached TOPA.	
M(2)	7C	Seller Occupied or Vacant units	COE date or, if checked below, <input type="checkbox"/> _____ days after COE (29 or fewer days) <input type="checkbox"/> _____ days after COE (30 or more days)	C.A.R. Form SIP attached if 29 or fewer days. C.A.R. Form RLAS attached if 30 or more days.
M(3)		Tenant Occupied units	See Tenant Occupied Property Addendum (C.A.R. form TOPA)	If tenant occupied <input type="checkbox"/> TOPA or <input type="checkbox"/> Other, attached
N	Documents/Fees/Compliance		Time for Performance	
N(1)	14A	Seller Delivery of Documents	7 (or _____) Days after Acceptance	
N(2)	19B	Sign and return Escrow Holder Provisions and Instructions	5 (or _____) Days after receipt	
N(3)	11K(2)	Time to pay fees for ordering HOA Documents	3 (or _____) Days after Acceptance	
N(4)	10B(1)	Install smoke alarm(s), CO detector(s), water heater bracing	7 (or _____) Days after Acceptance	
N(5)	28	Evidence of representative authority	3 Days after Acceptance	
O	Intentionally Left Blank			



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____ Date: _____

P		Items Included and Excluded		
P(1)	9	Items Included - All items specified in Paragraph 9B are included and the following, if checked: <div style="display: flex; flex-wrap: wrap;"> <div style="width: 33%;"> <input type="checkbox"/> Stove(s), oven(s), stove/oven combo(s); <input type="checkbox"/> Refrigerator(s); <input type="checkbox"/> Wine Refrigerator(s); <input type="checkbox"/> Washer(s); <input type="checkbox"/> Dryer(s); <input type="checkbox"/> Dishwasher(s); <input type="checkbox"/> Microwave(s); Additional Items Included: <input type="checkbox"/> _____ <input type="checkbox"/> _____ </div> <div style="width: 33%;"> <input type="checkbox"/> Video doorbell(s); <input type="checkbox"/> Security camera equipment; <input type="checkbox"/> Security system(s)/alarm(s), other than separate video doorbell and camera equipment; <input type="checkbox"/> Smart home control devices; <input type="checkbox"/> Wall mounted brackets for video or audio equipment; <input type="checkbox"/> _____ <input type="checkbox"/> _____ </div> <div style="width: 33%;"> <input type="checkbox"/> Above-ground pool(s) / <input type="checkbox"/> spa(s); <input checked="" type="checkbox"/> Bathroom mirrors, unless excluded below; <input type="checkbox"/> Electric car charging systems and stations; <input type="checkbox"/> Potted trees/shrubs; <input type="checkbox"/> _____ <input type="checkbox"/> _____ </div> </div>		
P(2)		Excluded Items: <input type="checkbox"/> _____; <input type="checkbox"/> _____; <input type="checkbox"/> _____;		
Q Allocation of Costs				
	Paragraph #	Item Description	Who Pays (if Both is checked, cost to be split equally unless Otherwise Agreed)	Additional Terms
Q(1)	10A, 11A	Natural Hazard Zone Disclosure Report, including tax information	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	<input type="checkbox"/> Environmental <input type="checkbox"/> Other _____ <input type="checkbox"/> Provided by: _____
Q(2)		_____ Report	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(3)		_____ Report	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(4)	10B(1)	Smoke alarms, CO detectors, water heater bracing	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(5)	10A 10B(2)	Government Required Point of Sale inspections, reports	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(6)	10B(2)(A)	Government Required Point of Sale corrective/remedial actions	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(7)	19B	Escrow Fees	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____ <input type="checkbox"/> Each to pay their own fees	Escrow Holder: _____
Q(8)	13	Owner's title insurance policy	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	Title Company (If different from Escrow Holder): _____
Q(9)		Buyer's Lender title insurance policy	Buyer	Unless Otherwise Agreed, Buyer shall purchase any title insurance policy insuring Buyer's lender.
Q(10)		County transfer tax, fees	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(11)		City transfer tax, fees	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(12)	11K(2)	HOA fee for preparing disclosures	Seller	
Q(13)		HOA certification fee	Buyer	
Q(14)		HOA transfer fees	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	Unless Otherwise Agreed, Seller shall pay for separate HOA move-out fee and Buyer shall pay for separate move-in fee. Applies if separately billed or itemized with cost in transfer fee.
Q(15)		Private transfer fees	Seller, or if checked, <input type="checkbox"/> Buyer <input type="checkbox"/> Both _____	
Q(16)		_____ fees or costs	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(17)		_____ fees or costs	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____	
Q(18)	10C	Home warranty plan: _____ _____	<input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Both _____ <input type="checkbox"/> Buyer waives home warranty plan	Cost not to exceed \$ _____. Issued by: _____
R	OTHER TERMS: _____ _____			



FIGURE 6.3: Residential Purchase Agreement (continued)

- Property Address: _____ Date: _____
- 4. PROPERTY ADDENDA AND ADVISORIES:** (check all that apply)
- A. PROPERTY TYPE ADDENDA:** This Agreement is subject to the terms contained in the Addenda checked below:
- ☐ Probate Agreement Purchase Addendum (C.A.R. Form PA-PA)
 - ☐ Manufactured Home Purchase Addendum (C.A.R. Form MH-PA)
 - ☐ Tenant Occupied Property Addendum (C.A.R. Form TOPA) (Should be checked whether current tenants will remain or not.)
 - ☐ Tenancy in Common Purchase Addendum (C.A.R. Form TIC-PA)
 - ☐ Stock Cooperative Purchase Addendum (C.A.R. Form COOP-PA)
 - ☐ Other _____
- B. OTHER ADDENDA:** This Agreement is subject to the terms contained in the Addenda checked below:
- ☐ Addendum # _____ (C.A.R. Form ADM)
 - ☐ Back Up Offer Addendum (C.A.R. Form BUO)
 - ☐ Septic, Well, Property Monument and Propane Addendum (C.A.R. Form SWPI)
 - ☐ Buyer Intent to Exchange Addendum (C.A.R. Form BXA)
 - ☐ Other _____
 - ☐ Short Sale Addendum (C.A.R. Form SSA)
 - ☐ Court Confirmation Addendum (C.A.R. Form CCA)
 - ☐ Seller Intent to Exchange Addendum (C.A.R. Form SXA)
 - ☐ Other _____
- C. BUYER AND SELLER ADVISORIES:** (Note: All Advisories below are provided for reference purposes only and are not intended to be incorporated into this Agreement.)
- | | |
|-----------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|
| <input checked="" type="checkbox"/> Buyer's Inspection Advisory (C.A.R. Form BIA) | <input checked="" type="checkbox"/> Fair Housing and Discrimination Advisory (C.A.R. Form FHDA) |
| <input checked="" type="checkbox"/> Wire Fraud Advisory (C.A.R. Form WFA) | <input checked="" type="checkbox"/> Cal. Consumer Privacy Act Advisory (C.A.R. Form CCPA) |
| | (Parties may also receive a privacy disclosure from their own Agent.) |
| <input type="checkbox"/> Wildfire Disaster Advisory (C.A.R. Form WFDA) | <input type="checkbox"/> Statewide Buyer and Seller Advisory (C.A.R. Form SBSA) |
| <input type="checkbox"/> Trust Advisory (C.A.R. Form TA) | <input type="checkbox"/> Short Sale Information and Advisory (C.A.R. Form SSIA) |
| <input type="checkbox"/> REO Advisory (C.A.R. Form REO) | <input type="checkbox"/> Probate Advisory (C.A.R. Form PA) |
| <input type="checkbox"/> Other _____ | <input type="checkbox"/> Other _____ |
- 5. ADDITIONAL TERMS AFFECTING PURCHASE PRICE:** Buyer represents that funds will be good when deposited with Escrow Holder.
- A. DEPOSIT:**
- (1) **INITIAL DEPOSIT:** Buyer shall deliver deposit directly to Escrow Holder. If a method other than wire transfer is specified in **paragraph 3D(1)** and such method is unacceptable to Escrow Holder, then upon notice from Escrow Holder, delivery shall be by wire transfer.
 - (2) **INCREASED DEPOSIT:** Increased deposit specified in **paragraph 3D(2)** is to be delivered to Escrow Holder in the same manner as the Initial Deposit. If the Parties agree to liquidated damages in this Agreement, they also agree to incorporate the increased deposit into the liquidated damages amount by signing a new liquidated damages clause (C.A.R. Form DID) at the time the increased deposit is delivered to Escrow Holder.
 - (3) **RETENTION OF DEPOSIT:** Paragraph 29, if initialed by all Parties or otherwise incorporated into this Agreement, specifies a remedy for Buyer's default. Buyer and Seller are advised to consult with a qualified California real estate attorney before adding any other clause specifying a remedy (such as release or forfeiture of deposit or making a deposit non-refundable) for failure of Buyer to complete the purchase. Any such clause shall be deemed invalid unless the clause independently satisfies the statutory liquidated damages requirements set forth in the Civil Code.
- B. ALL CASH OFFER:** If an all cash offer is specified in **paragraph 3A**, no loan is needed to purchase the Property. This Agreement is NOT contingent on Buyer obtaining a loan. Buyer shall, within the time specified in **paragraph 3H(1)**, Deliver written verification of funds sufficient for the purchase price and closing costs.
- C. LOAN(S):**
- (1) **FIRST LOAN:** This loan will provide for conventional financing **UNLESS** FHA, VA, Seller Financing (C.A.R. Form SFA), or Other is checked in **paragraph 3E(1)**.
 - (2) **ADDITIONAL FINANCED AMOUNT:** If an additional financed amount is specified in **paragraph 3E(2)**, that amount will provide for conventional financing **UNLESS** Seller Financing (C.A.R. Form SFA), or Other is checked in **paragraph 3E(2)**.
 - (3) **BUYER'S LOAN STATUS:** Buyer authorizes Seller and Seller's Authorized Agent to contact Buyer's lender(s) to determine the status of any Buyer's loan specified in **paragraph 3E**, or any alternate loan Buyer pursues, whether or not a contingency of this Agreement. If the contact information for Buyer's lender(s) is different from that provided under the terms of **paragraph 6B**, Buyer shall Deliver the updated contact information within 1 Day of Seller's request.
 - (4) **FHA/VA:** If **FHA** or **VA** is checked in **paragraph 3E(1)**, a **FHA/VA** amendatory clause (C.A.R. Form FVAC) shall be incorporated and Signed by all Parties. Buyer shall, within the time specified in **paragraph 3E(1)**, Deliver to Seller written notice (C.A.R. Form RR or AEA) (i) of any lender requirements that Buyer requests Seller to pay for or otherwise correct or (ii) that there are no lender requirements. Notwithstanding Seller's agreement that Buyer may obtain FHA or VA financing, Seller has no obligation to pay or satisfy any or all lender requirements unless agreed in writing.
- D. BALANCE OF PURCHASE PRICE (DOWN PAYMENT, paragraph 3F) (including all-cash funds)** to be deposited with Escrow Holder pursuant to Escrow Holder instructions.
- E. LIMITS ON CREDITS TO BUYER:** Any credit to Buyer as specified in **paragraph 3G(1)** or Otherwise Agreed, from any source, for closing or other costs that is agreed to by the Parties ("Contractual Credit") shall be disclosed to Buyer's lender, if any, and made at Close Of Escrow. If the total credit allowed by Buyer's lender ("Lender Allowable Credit") is less than the Contractual Credit, then (i) the Contractual Credit from Seller shall be reduced to the Lender Allowable Credit, and (ii) in the absence of a separate written agreement between the Parties, there shall be no automatic adjustment to the purchase price to make up for the difference between the Contractual Credit and the Lender Allowable Credit.
- 6. ADDITIONAL FINANCING TERMS:**
- A. VERIFICATION OF DOWN PAYMENT AND CLOSING COSTS:** Written verification of Buyer's down payment and closing costs, within the time specified in **paragraph 3H(2)** may be made by Buyer or Buyer's lender or loan broker pursuant to **paragraph 6B**.
- B. VERIFICATION OF LOAN APPLICATIONS:** Buyer shall Deliver to Seller, within the time specified in **paragraph 3H(3)** a letter from Buyer's lender or loan broker stating that, based on a review of Buyer's written application and credit report, Buyer is prequalified or preapproved for any NEW loan specified in **paragraph 3E**. If any loan specified in **paragraph 3E** is an adjustable rate loan, the prequalification or preapproval letter shall be based on the qualifying rate, not the initial loan rate.



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____

Date: _____

- C. BUYER STATED FINANCING:** Seller is relying on Buyer's representation of the type of financing specified (including, but not limited to, as applicable, all cash, amount of down payment, or contingent or non-contingent loan). Seller has agreed to a specific closing date, purchase price, and to sell to Buyer in reliance on Buyer's specified financing. Buyer shall pursue the financing specified in this Agreement, even if Buyer also elects to pursue an alternative form of financing. Seller has no obligation to cooperate with Buyer's efforts to obtain any financing other than that specified in this Agreement but shall not interfere with closing at the purchase price on the COE date (**paragraph 3B**) even if based upon alternate financing. Buyer's inability to obtain alternate financing does not excuse Buyer from the obligation to purchase the Property and close escrow as specified in this Agreement.
- 7. CLOSING AND POSSESSION:**
- A. OCCUPANCY:** Buyer intends to occupy the Property as indicated in **paragraph 3E(3)**. Occupancy may impact available financing.
- B. CONDITION OF PROPERTY ON CLOSING:**
- (1) Unless Otherwise Agreed: (i) the Property shall be delivered "**As-Is**" in its PRESENT physical condition as of the date of Acceptance; (ii) the Property, including pool, spa, landscaping and grounds, is to be maintained in substantially the same condition as on the date of Acceptance; and (iii) all debris and personal property not included in the sale shall be removed by Close Of Escrow or at the time possession is delivered to Buyer, if not on the same date. If items are not removed when possession is delivered to Buyer, all items shall be deemed abandoned. Buyer, after first Delivering to Seller written notice to remove the items within **3 Days**, may pay to have such items removed or disposed of and may bring legal action, as per this Agreement, to receive reasonable costs from Seller.
- (2) **Buyer is strongly advised to conduct investigations of the entire Property in order to determine its present condition. Seller and Agents may not be aware of all defects affecting the Property or other factors that Buyer considers important. Property improvements may not be built according to code, in compliance with current Law, or have had all required permits issued and/or finalized.**
- C. SELLER REMAINING IN POSSESSION AFTER CLOSE OF ESCROW:** If Seller has the right to remain in possession after Close Of Escrow pursuant to **paragraph 3M(2)** or as Otherwise Agreed, (i) the Parties are advised to consult with their insurance and legal advisors for information about liability and damage or injury to persons and personal and real property; (ii) Buyer is advised to consult with Buyer's lender about the impact of Seller's occupancy on Buyer's loan; and (iii) consult with a qualified California real estate attorney where the Property is located to determine the ongoing rights and responsibilities of both Buyer and Seller with regard to each other, including possible tenant rights, and what type of written agreement to use to document the relationship between the Parties.
- D. At Close Of Escrow:** (i) Seller assigns to Buyer any assignable warranty rights for items included in the sale; and (ii) Seller shall Deliver to Buyer available Copies of any such warranties. Agents cannot and will not determine the assignability of any warranties.
- E. Seller shall, on Close Of Escrow unless Otherwise Agreed and even if Seller remains in possession, provide keys, passwords, codes and/or means to operate all locks, mailboxes, security systems, alarms, home automation systems, intranet and Internet-connected devices included in the purchase price, garage door openers, and all items included in either **paragraph 3P** or **paragraph 9**. If the Property is a condominium or located in a common interest development, Seller shall be responsible for securing or providing any such items for Association amenities, facilities, and access. Buyer may be required to pay a deposit to the Homeowners' Association ("HOA") to obtain keys to accessible HOA facilities.**
- 8. CONTINGENCIES AND REMOVAL OF CONTINGENCIES:**
- A. LOAN(S):**
- (1) This Agreement is, **unless otherwise specified in paragraph 3L(1) or an attached CR form**, contingent upon Buyer obtaining the loan(s) specified. If contingent, Buyer shall act diligently and in good faith to obtain the designated loan(s). **If there is no appraisal contingency or the appraisal contingency has been waived or removed, then failure of the Property to appraise at the purchase price does not entitle Buyer to exercise the cancellation right pursuant to the loan contingency if Buyer is otherwise qualified for the specified loan and Buyer is able to satisfy lender's non-appraisal conditions for closing the loan.**
- (2) Buyer is advised to investigate the insurability of the Property as early as possible, as this may be a requirement for lending. Buyer's ability to obtain insurance for the Property, including fire insurance, is part of Buyer's Investigation of Property contingency. Failure of Buyer to obtain insurance may justify cancellation based on the Investigation contingency but not the loan contingency.
- (3) Buyer's contractual obligations regarding deposit, balance of down payment and closing costs **are not contingencies** of this Agreement, unless Otherwise Agreed.
- (4) If there is an appraisal contingency, removal of the loan contingency shall not be deemed removal of the appraisal contingency.
- (5) **NO LOAN CONTINGENCY:** If "No loan contingency" is checked in **paragraph 3L(1)**, obtaining any loan specified is NOT a contingency of this Agreement. If Buyer does not obtain the loan specified, and as a result is unable to purchase the Property, Seller may be entitled to Buyer's deposit or other legal remedies.
- B. APPRAISAL:**
- (1) This Agreement is, **unless otherwise specified in paragraph 3L(2) or an attached CR form**, contingent upon a written appraisal of the Property by a licensed or certified appraiser at no less than the amount specified in **paragraph 3L(2)**, without requiring repairs or improvements to the Property. Appraisals are often a reliable source to verify square footage of the subject Property. However, the ability to cancel based on the measurements provided in an appraisal falls within the Investigation of Property contingency. The appraisal contingency is solely limited to the value determined by the appraisal. For any cancellation based upon this appraisal contingency, Buyer shall Deliver a Copy of the written appraisal to Seller, upon request by Seller.
- (2) **NO APPRAISAL CONTINGENCY:** If "No appraisal contingency" is checked in **paragraph 3L(2)**, then Buyer may not use the loan contingency specified in **paragraph 3L(1)** to cancel this Agreement if the sole reason for not obtaining the loan is that the appraisal relied upon by Buyer's lender values the property at an amount less than that specified in **paragraph 3L(2)**. If Buyer is unable to obtain the loan specified solely for this reason, Seller may be entitled to Buyer's deposit or other legal remedies.
- C. INVESTIGATION OF PROPERTY:** This Agreement is, as specified in **paragraph 3L(3)**, contingent upon Buyer's acceptance of the condition of, and any other matter affecting, the Property. See **paragraph 12**.
- D. REVIEW OF SELLER DOCUMENTS:** This Agreement is, as specified in **paragraph 3L(4)**, contingent upon Buyer's review of Seller's documents required in **paragraph 14A**.



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____ Date: _____

E. TITLE:

- (1) This Agreement is, as specified in **paragraph 3L(5)**, contingent upon Buyer's ability to obtain the title policy provided for in **paragraph 13G** and on Buyer's review of a current Preliminary Report and items that are disclosed or observable even if not on record or not specified in the Preliminary Report, and satisfying Buyer regarding the current status of title. Buyer is advised to review all underlying documents and other matters affecting title, including, but not limited to, any documents or deeds referenced in the Preliminary Report and any plotted easements.
- (2) Buyer has **5 Days** after receipt to review a revised Preliminary Report, if any, furnished by the Title Company and cancel the transaction if the revised Preliminary Report reveals material or substantial deviations from a previously provided Preliminary Report.

F. CONDOMINIUM/PLANNED DEVELOPMENT DISCLOSURES (IF APPLICABLE): This Agreement is, as specified in **paragraph 3L(6)**, contingent upon Buyer's review of Common Interest Disclosures required by Civil Code § 4525 and under **paragraph 11K** ("CI Disclosures").

G. BUYER REVIEW OF LEASED OR LIENED ITEMS CONTINGENCY: Buyer's review of and ability and willingness to assume any lease, maintenance agreement or other ongoing financial obligation, or to accept the Property subject to any lien, disclosed pursuant to **paragraph 9B(6)**, is, as specified in **paragraph 3L(7)**, a contingency of this Agreement. Any assumption of the lease shall not require any financial obligation or contribution by Seller. Seller, after first Delivering a Notice to Buyer to Perform, may cancel this Agreement if Buyer, by the time specified in **paragraph 3L(7)**, refuses to enter into any necessary written agreements to accept responsibility for all obligations of Seller-disclosed leased or lienied items.

H. REMOVAL OR WAIVER OF CONTINGENCIES WITH OFFER: Buyer shall have no obligation to remove a contractual contingency unless Seller has provided all required documents, reports, disclosures, and information pertaining to that contingency. If Buyer does remove a contingency without first receiving all required information from Seller, Buyer is relinquishing any contractual rights that apply to that contingency. If Buyer removes or waives any contingencies without an adequate understanding of the Property's condition or Buyer's ability to purchase, Buyer is acting against the advice of Agent.

I. REMOVAL OF CONTINGENCY OR CANCELLATION:

- (1) For any contingency specified in **paragraph 3L** or **8**, Buyer shall, within the applicable period specified, remove the contingency or cancel this Agreement.
- (2) For the contingencies for review of Seller Documents, Preliminary Report, and Condominium/Planned Development Disclosures, Buyer shall, within the time specified in **paragraph 3L** or **5 Days** after receipt of Seller Documents or CI Disclosures, whichever occurs later, remove the applicable contingency in writing or cancel this Agreement.
- (3) If Buyer does not remove a contingency within the time specified, Seller, after first giving Buyer a Notice to Buyer to Perform (C.A.R. Form NBP), shall have the right to cancel this Agreement.

J. SALE OF BUYER'S PROPERTY: This Agreement and Buyer's ability to obtain financing are NOT contingent upon the sale of any property owned by Buyer unless the Sale of Buyer's Property (C.A.R. Form COP) is checked as a contingency of this Agreement in **paragraph 3L(8)**.

9. ITEMS INCLUDED IN AND EXCLUDED FROM SALE:

A. NOTE TO BUYER AND SELLER: Items listed as included or excluded in the Multiple Listing Service (MLS), flyers, marketing materials, or disclosures are NOT included in the purchase price or excluded from the sale unless specified in this paragraph or **paragraph 3P** or as Otherwise Agreed. Any items included herein are components of the home and are not intended to affect the price. All items are transferred without Seller warranty.

B. ITEMS INCLUDED IN SALE:

- (1) All EXISTING fixtures and fittings that are attached to the Property;
- (2) EXISTING electrical, mechanical, lighting, plumbing and heating fixtures, ceiling fans, fireplace inserts, gas logs and grates, solar power systems, built-in appliances and appliances for which special openings or encasements have been made (whether or not checked in **paragraph 3P**), window and door screens, awnings, shutters, window coverings (which includes blinds, curtains, drapery, shutters or any other materials that cover any portion of the window), attached floor coverings, television antennas, satellite dishes, air coolers/conditioners, pool/spa equipment (including, but not limited to, any cleaning equipment such as motorized/automatic pool cleaners, pool nets, pool covers), garage door openers/remote controls, mailbox, in-ground landscaping, water features and fountains, water softeners, water purifiers, light bulbs (including smart bulbs) and all items specified as included in **paragraph 3P**, if currently existing at the time of Acceptance.
Note: If Seller does not intend to include any item specified as being included above because it is not owned by Seller, whether placed on the Property by Agent, stager or other third party, the item should be listed as being excluded in **paragraph 3P** or excluded by Seller in a counter offer.
- (3) Security System includes any devices, hardware, software, or control units used to monitor and secure the Property, including but not limited to, any motion detectors, door or window alarms, and any other equipment utilized for such purpose. If checked in **paragraph 3P**, all such items are included in the sale, whether hard wired or not.
- (4) Home Automation (Smart Home Features) includes any electronic devices and features including, but not limited to, thermostat controls, kitchen appliances not otherwise excluded, and lighting systems, that are connected (hard wired or wirelessly) to a control unit, computer, tablet, phone, or other "smart" device. Any Smart Home devices and features that are physically affixed to the real property, and also existing light bulbs, are included in the sale. Buyer is advised to use **paragraph 3P(1)** or an addendum to address more directly specific items to be included. Seller is advised to use a counter offer to address more directly any items to be excluded.
- (5) Non-Dedicated Devices: If checked in **paragraph 3P**, all smart home and security system control devices are included in the sale, except for any non-dedicated personal computer, tablet, or phone used to control such features. Buyer acknowledges that a separate device and access to wifi or Internet may be required to operate some smart home features and Buyer may have to obtain such device after Close Of Escrow. Buyer is advised to change all passwords and ensure the security of any smart home features.
- (6) **LEASED OR LIENED ITEMS AND SYSTEMS:** Seller, within the time specified in **paragraph 3N(1)**, shall (i) disclose to Buyer if any item or system specified in **paragraph 3P** or **9B** or otherwise included in the sale is leased, or not owned by Seller, or is subject to any maintenance or other ongoing financial obligation, or specifically subject to a lien or other encumbrance or loan, and (ii) Deliver to Buyer all written materials (such as lease, warranty, financing, etc.) concerning any such item.
- (7) Seller represents that all items included in the purchase price, unless Otherwise Agreed, (i) are owned by Seller and shall be transferred free and clear of liens and encumbrances, except the items and systems identified pursuant to **paragraph 9B(6)**, and (ii) are transferred without Seller warranty regardless of value. Seller shall cooperate with the identification of any software or applications and Buyer's efforts to transfer any services needed to operate any Smart Home Features or other items included in this Agreement, including, but not limited to, utilities or security systems.



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____

Date: _____

- C. ITEMS EXCLUDED FROM SALE:** Unless Otherwise Agreed, the following items are excluded from sale: (i) All items specified in paragraph 3P(2); (ii) audio and video components (such as flat screen TVs, speakers and other items) if any such item is not itself attached to the Property, even if a bracket or other mechanism attached to the component or item is attached to the Property; (iii) furniture and other items secured to the Property for earthquake or safety purposes. **Unless otherwise specified in paragraph 3P(1), brackets attached to walls, floors or ceilings for any such component, furniture or item will be removed and holes or other damage shall be repaired, but not painted.**
- 10. ALLOCATION OF COSTS:**
- A. INSPECTIONS, REPORTS AND CERTIFICATES:** Paragraphs 3Q(1), (2), (3), and (5) only determines who is to pay for the inspection, test, certificate or service ("Report") mentioned; it does not determine who is to pay for any work recommended or identified in the Report. Agreements for payment of required work should be specified elsewhere in paragraph 3Q, or 3R, or in a separate agreement (such as C.A.R. Forms RR, RRRR, ADM or AEA).
- B. GOVERNMENT REQUIREMENTS AND CORRECTIVE OR REMEDIAL ACTIONS:**
- (1) **LEGALLY REQUIRED INSTALLATIONS AND PROPERTY IMPROVEMENTS:** Any required installation of smoke alarm or carbon monoxide device(s) or securing of water heater shall be completed within the time specified in paragraph 3N(4) and paid by the Party specified in paragraph 3Q(4). If Buyer is to pay for these items, Buyer, as instructed by Escrow Holder, shall deposit funds into escrow or directly to the vendor completing the repair or installation. Prior to Close Of Escrow, Seller shall Deliver to Buyer written statement(s) of compliance in accordance with any Law, unless Seller is exempt. If Seller is to pay for these items and does not fulfill Seller's obligation in the time specified, and Buyer incurs costs to comply with lender requirements concerning those items, Seller shall be responsible for Buyer's costs.
- (2) **POINT OF SALE REQUIREMENTS:**
- (A) Point of sale inspections, reports and repairs refer to any such actions required to be completed before or after Close Of Escrow that are required in order to close under any Law and paid by Party specified in paragraphs 3Q(5) and 3Q(6). Unless Parties Otherwise Agree to another time period, any such repair, shall be completed prior to final verification of Property. If Buyer agrees to pay for any portion of such repair, Buyer, shall (i) directly pay to the vendor completing the repair or (ii) provide an invoice to Escrow Holder, deposit funds into escrow sufficient to pay for Buyer's portion of such repair and request Escrow Holder pay the vendor completing the repair.
- (B) Buyer shall be provided, within the time specified in paragraph 3N(1), unless Parties Otherwise Agree to another time period, a Copy of any required government-conducted or point-of-sale inspection report prepared pursuant to this Agreement or in anticipation of this sale of the Property.
- (3) **REINSPECTION FEES:** If any repair in paragraph 10B(1) is not completed within the time specified and the lender requires an additional inspection to be made, Seller shall be responsible for any corresponding reinspection fee. If Buyer incurs costs to comply with lender requirements concerning those items, Seller shall be responsible for those costs.
- (4) **INFORMATION AND ADVICE ON REQUIREMENTS:** Buyer and Seller are advised to seek information from a knowledgeable source regarding local and State mandates and whether they are point of sale requirements or requirements of ownership. Agents do not have expertise in this area and cannot ascertain all of the requirements or costs of compliance.
- C. HOME WARRANTY:**
- (1) Buyer shall choose the coverages, regardless of any optional coverages indicated, of the home warranty plan and Buyer shall pay any cost of that plan, chosen by Buyer, that exceeds the amount allocated to Seller in paragraph 3Q(18). Buyer is informed that home warranty plans have many optional coverages, including but not limited to, coverages for Air Conditioner and Pool/Spa. Buyer is advised to investigate these coverages to determine those that may be suitable for Buyer.
- (2) **If Buyer waives the purchase of a home warranty plan in paragraph 3Q(18), Buyer may still purchase a home warranty plan, at Buyer's expense, prior to Close Of Escrow.**
- 11. STATUTORY AND OTHER DISCLOSURES (INCLUDING LEAD-BASED PAINT HAZARD DISCLOSURES) AND CANCELLATION RIGHTS:**
- A. TDS, NHD, AND OTHER STATUTORY AND SUPPLEMENTAL DISCLOSURES:**
- (1) Seller shall, within the time specified in paragraph 3N(1), Deliver to Buyer: unless exempt, fully completed disclosures or notices required by §§ 1102 et. seq. and 1103 et. seq. of the Civil Code ("Statutory Disclosures"). Statutory Disclosures include, but are not limited to, a Real Estate Transfer Disclosure Statement (C.A.R. Form TDS), Natural Hazard Disclosure Statement ("NHD"), notice or actual knowledge of release of illegal controlled substance, notice of special tax and/or assessments (or, if allowed, substantially equivalent notice regarding the Mello-Roos Community Facilities Act of 1982 and Improvement Bond Act of 1915) and, if Seller has actual knowledge, of industrial use and military ordnance location (C.A.R. Form SPQ or ESD), and, if the Property is in a high or very high fire hazard severity area, the information, notices, documentation, and agreements required by §§ 1102.6(f) and 1102.19 of the Civil Code (C.A.R. Form FHDS).
- (2) The Real Estate Transfer Disclosure Statement required by this paragraph is considered fully completed if Seller has completed the section titled Coordination with Other Disclosure Forms by checking a box (Section I), and Seller has completed and answered all questions and Signed the Seller's Information section (Section II) and the Seller's Agent, if any, has completed and Signed the Seller's Agent's section (Section III), or, if applicable, an Agent Visual Inspection Disclosure (C.A.R. Form AVID). Section V acknowledgment of receipt of a Copy of the TDS shall be Signed after all previous sections, if applicable, have been completed. Nothing stated herein relieves a Buyer's Agent, if any, from the obligation to (i) conduct a reasonably competent and diligent visual inspection of the accessible areas of the Property and disclose, on Section IV of the TDS, or an AVID, material facts affecting the value or desirability of the Property that were or should have been revealed by such an inspection or (ii) complete any sections on all disclosures required to be completed by Buyer's Agent.
- (3) Seller shall, within the time specified in paragraph 3N(1), provide "Supplemental Disclosures" as follows: (i) unless exempt from the obligation to provide a TDS, complete a Seller Property Questionnaire (C.A.R. Form SPQ) by answering all questions and Signing and Delivering a Copy to Buyer; (ii) if exempt from the obligation to provide a TDS, complete an Exempt Seller Disclosure (C.A.R. Form ESD) by answering all questions and Signing and Delivering a Copy to Buyer.
- (4) In the event Seller or Seller's Agent, prior to Close Of Escrow, becomes aware of adverse conditions materially affecting the Property, or any material inaccuracy in disclosures, information or representations previously provided to Buyer under this paragraph, Seller shall, in writing, promptly provide a subsequent or amended TDS, Seller Property Questionnaire or other document, in writing, covering those items. Any such document shall be deemed an amendment to the TDS or SPQ. **However, a subsequent or amended disclosure shall not be required for conditions and material inaccuracies of which Buyer is otherwise aware, or which are discovered by Buyer or disclosed in reports or documents provided to or ordered and paid for by Buyer.**



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____ Date: _____

B. LEAD DISCLOSURES:

(1) Seller shall, within the time specified in **paragraph 3N(1)**, for any residential property built before January 1, 1978, unless exempted by Law, Deliver to Buyer a fully completed Federal Lead-Based Paint Disclosures (C.A.R. Form LPD) and pamphlet ("Lead Disclosures").

(2) Buyer shall, within the time specified in **paragraph 3L(3)**, have the opportunity to conduct a risk assessment or to inspect for the presence of lead-based paint hazards.

C. HOME FIRE HARDENING DISCLOSURE AND ADVISORY: For any transaction where a TDS is required, the property is located in a high or very high fire hazard severity zone, and the home was constructed before January 1, 2010, Seller shall, within the time specified in **paragraph 3N(1)**, Deliver to Buyer: (i) a home hardening disclosure required by law; and (ii) a statement of features of which the Seller is aware that may make the home vulnerable to wildfire and flying embers; and (iii) a final inspection report regarding compliance with defensible space requirements if one was prepared pursuant to Government Code § 51182 (C.A.R. Form FHDS).

D. DEFENSIBLE SPACE DISCLOSURE AND ADDENDUM: For any transaction in which a TDS is required and the property is located in a high or very high fire hazard severity zone, Seller shall, within the time specified in **paragraph 3N(1)**, Deliver to Buyer (i) a disclosure of whether the Property is in compliance with any applicable defensible space laws designed to protect a structure on the Property from fire; and (ii) an addendum allocating responsibility for compliance with any such defensible space law (C.A.R. Form FHDS).

E. WAIVER PROHIBITED: Waiver of Statutory, Lead, and other Disclosures in **paragraphs 11A(1), 11B, 11C, and 11D** are prohibited by Law.

F. RETURN OF SIGNED COPIES: Buyer shall, within the time specified in **paragraph 3L(3) OR 5 Days** after Delivery of any disclosures specified in **paragraphs 11 A, B, C or D**, and defensible space addendum in **paragraph 11D**, whichever is later, return Signed Copies of the disclosures, and if applicable, addendum, to Seller.

G. TERMINATION RIGHTS:

(1) **Statutory and Other Disclosures:** If any disclosure specified in **paragraphs 11A, B, C, or D**, or subsequent or amended disclosure to those just specified, is Delivered to Buyer after the offer is Signed, Buyer shall have the right to terminate this Agreement within **3 Days** after Delivery in person, or **5 Days** after Delivery by deposit in the mail, or by an electronic record or email satisfying the Uniform Electronic Transactions Act (UETA), by giving written notice of rescission to Seller or Seller's Authorized Agent. If Buyer does not rescind within this time period, Buyer has been deemed to have approved the disclosure and shall not have the right to cancel.

(2) **Defensible Space Compliance:** If, by the time specified in **paragraph 11F**, Buyer does not agree to the terms regarding defensible space compliance Delivered by Seller, as indicated by mutual signatures on the FHDS, then Seller, after first Delivering a Notice to Buyer to Perform, may cancel this Agreement.

H. WITHHOLDING TAXES: Buyer and Seller hereby instruct Escrow Holder to withhold the applicable required amounts to comply with federal and California withholding Laws and forward such amounts to the Internal Revenue Service and Franchise Tax Board, respectively. However, no federal withholding is required if, prior to Close Of Escrow, Seller Delivers (i) to Buyer and Escrow Holder a fully completed affidavit (C.A.R. Form AS) sufficient to avoid withholding pursuant to federal withholding Law (FIRPTA); **OR (ii)** to a qualified substitute (usually a title company or an independent escrow company) a fully completed affidavit (C.A.R. Form AS) sufficient to avoid withholding pursuant to federal withholding Law AND the qualified substitute Delivers to Buyer and Escrow Holder an affidavit signed under penalty of perjury (C.A.R. Form QS) that the qualified substitute has received the fully completed Seller's affidavit and the Seller states that no federal withholding is required; **OR (iii)** to Buyer other documentation satisfying the requirements under Internal Revenue Code § 1445 (FIRPTA). No withholding is required under California Law if, prior to Close Of Escrow, Escrow Holder has received sufficient documentation from Seller that no withholding is required, and Buyer has been informed by Escrow Holder.

I. MEGAN'S LAW DATABASE DISCLOSURE: Notice: Pursuant to § 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at **www.meganslaw.ca.gov**. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides. (Neither Seller nor Agent are required to check this website. If Buyer wants further information, Agent recommends that Buyer obtain information from this website during Buyer's investigation contingency period. Agents do not have expertise in this area.)

J. NOTICE REGARDING GAS AND HAZARDOUS LIQUID TRANSMISSION PIPELINES: This notice is being provided simply to inform you that information about the general location of gas and hazardous liquid transmission pipelines is available to the public via the National Pipeline Mapping System (NPMS) Internet Web site maintained by the United States Department of Transportation at **http://www.npms.phmsa.dot.gov/**. To seek further information about possible transmission pipelines near the Property, you may contact your local gas utility or other pipeline operators in the area. Contact information for pipeline operators is searchable by ZIP Code and county on the NPMS Internet Website. (Neither Seller nor Agent are required to check this website. If Buyer wants further information, Agent recommends that Buyer obtain information from this website during Buyer's investigation contingency period. Agents do not have expertise in this area.)

K. CONDOMINIUM/PLANNED DEVELOPMENT DISCLOSURES:

(1) Seller shall, within the time specified in **paragraph 3N(1)**, disclose to Buyer whether the Property is a condominium or is located in a planned development, other common interest development, or otherwise subject to covenants, conditions, and restrictions (C.A.R. Form SPQ or ESD).

(2) If the Property is a condominium or is located in a planned development or other common interest development with a HOA, Seller shall, within the time specified in **paragraph 3N(3)**, order from, and pay any required fee as specified in **paragraph 3Q(12)** for the following items to the HOA (C.A.R. Form HOA-IR): (i) Copies of any documents required by Law (C.A.R. Form HOA-RS); (ii) disclosure of any pending or anticipated claim or litigation by or against the HOA; (iii) a statement containing the location and number of designated parking and storage spaces; (iv) Copies of the most recent 12 months of HOA minutes for regular and special meetings; (v) the names and contact information of all HOAs governing the Property; (vi) pet restrictions; and (vii) smoking restrictions ("CI Disclosures"). Seller shall itemize and Deliver to Buyer all CI Disclosures received from the HOA and any CI Disclosures in Seller's possession. Seller shall, as directed by Escrow Holder, deposit funds into escrow or direct to HOA or management company to pay for any of the above.

L. NATURAL AND ENVIRONMENTAL HAZARDS: Seller shall, within the time specified in **paragraph 3N(1)**, if required by Law: (i) Deliver to Buyer the earthquake guide and environmental hazards booklet, and for all residential property with 1-4 units and any manufactured or mobile home built before January 1, 1960, fully complete and Deliver the Residential Earthquake Risk Disclosure Statement; and (ii) even if exempt from the obligation to provide a NHD, disclose if the Property is located in a Special Flood Hazard Area; Potential Flooding (Inundation) Area; Very High Fire Hazard Zone; State Fire Responsibility Area; Earthquake Fault Zone; Seismic Hazard Zone; and (iii) disclose any other zone as required by Law and provide any other information required for those zones.



FIGURE 6.3: Residential Purchase Agreement (continued)

- Property Address: _____ Date: _____
- M. KNOWN MATERIAL FACTS:** Seller shall, within the time specified in **paragraph 3N(1)**, DISCLOSE KNOWN MATERIAL FACTS AND DEFECTS affecting the Property, including, but not limited to, known insurance claims within the past five years, or provide Buyer with permission to contact lender to get such information (C.A.R. Form ARC), and make any and all other disclosures required by Law.
- 12. BUYER'S INVESTIGATION OF PROPERTY AND MATTERS AFFECTING PROPERTY:**
- A.** Buyer shall, within the time specified in **paragraph 3L(3)**, have the right, at Buyer's expense unless Otherwise Agreed, to conduct inspections, investigations, tests, surveys and other studies ("Buyer Investigations").
- B.** Buyer Investigations include, but are not limited to:
- (1) Inspections regarding any physical attributes of the Property or items connected to the Property, such as:
 - (A) A general home inspection.
 - (B) An inspection for lead-based paint and other lead-based paint hazards.
 - (C) An inspection specifically for wood destroying pests and organisms. Any inspection for wood destroying pests and organisms shall be prepared by a registered Structural Pest Control company; shall cover the main building and attached structures; may cover detached structures; shall NOT include water tests of shower pans on upper level units unless the owners of property below the shower consent; shall NOT include roof coverings; and, if the Property is a unit in a condominium or other common interest subdivision, the inspection shall include only the separate interest and any exclusive-use areas being transferred, and shall NOT include common areas; and shall include a report ("Pest Control Report") showing the findings of the company which shall be separated into sections for evident infestation or infections (Section 1) and for conditions likely to lead to infestation or infection (Section 2).
 - (D) Any other specific inspections of the physical condition of the land and improvements.
 - (2) All other Buyer Investigations, such as insurance, not specified above. See, Buyer's Inspection Advisory (C.A.R. Form BIA) for more.
 - (3) A review of reports, disclosures or information prepared by or for Seller and Delivered to Buyer pursuant to **paragraphs 3, 10, 11, and 14A**.
- C.** Without Seller's prior written consent, Buyer shall neither make nor cause to be made: **(i)** invasive or destructive Buyer Investigations, except for minimally invasive testing required to prepare a Pest Control Report, which shall not include any holes or drilling through stucco or similar material; or **(ii)** inspections by any governmental building or zoning inspector or government employee, unless required by Law.
- D.** Seller shall make the Property available for all Buyer Investigations. Seller is not obligated to move any existing personal property. Seller shall have water, gas, electricity and all operable pilot lights on for Buyer's Investigations and through the date possession is delivered to Buyer. Buyer shall, **(i)** by the time specified in **paragraph 3L(3)**, complete Buyer Investigations and satisfy themselves as to the condition of the Property, and either remove the contingency or cancel this Agreement, and **(ii)** by the time specified in **paragraph 3L(3)** or **3 Days** after receipt of any Investigation report, whichever is later, give Seller at no cost, complete Copies of all such reports obtained by Buyer, which obligation shall survive the termination of this Agreement. This Delivery of Investigation reports shall not include any appraisal, except an appraisal received in connection with an FHA or VA loan.
- E. Buyer indemnity and Seller protection for entry upon the Property:** Buyer shall: **(i)** keep the Property free and clear of liens; **(ii)** repair all damage arising from Buyer Investigations; and **(iii)** indemnify and hold Seller harmless from all resulting liability, claims, demands, damages and costs. Buyer shall carry, or Buyer shall require anyone acting on Buyer's behalf to carry, policies of liability, workers' compensation and other applicable insurance, defending and protecting Seller from liability for any injuries to persons or property occurring during any Buyer Investigations or work done on the Property at Buyer's direction prior to Close Of Escrow. Seller is advised that certain protections may be afforded Seller by recording a "Notice of Non-Responsibility" (C.A.R. Form NNR) for Buyer Investigations and work done on the Property at Buyer's direction. Buyer's obligations under this paragraph shall survive the termination of this Agreement.
- 13. TITLE AND VESTING:**
- A.** Buyer shall, within the time specified in **paragraph 3N(1)**, be provided a current Preliminary Report by the person responsible for paying for the title report in **paragraph 3Q(8)**. If Buyer is responsible for paying, Buyer shall act diligently and in good faith to obtain such Preliminary Report within the time specified. The Preliminary Report is only an offer by the title insurer to issue a policy of title insurance and may not contain every item affecting title. The company providing the Preliminary Report shall, prior to issuing a Preliminary Report, conduct a search of the General Index for all Sellers except banks or other institutional lenders selling properties they acquired through foreclosure (REOs), corporations, and government entities.
- B.** Title is taken in its present condition subject to all encumbrances, easements, covenants, conditions, restrictions, rights and other matters, whether of record or not, as of the date of Acceptance except for: **(i)** monetary liens of record unless Buyer is assuming those obligations or taking the Property subject to those obligations; and **(ii)** those matters which Seller has agreed to remove in writing. For any lien or matter not being transferred upon sale, Seller will take necessary action to deliver title free and clear of such lien or matter.
- C.** Seller shall within **7 Days** after request, give Escrow Holder necessary information to clear title.
- D.** Seller shall, within the time specified in **paragraph 3N(1)**, disclose to Buyer all matters known to Seller affecting title, whether of record or not.
- E.** If Buyer is a legal entity and the Property purchase price is at least \$300,000 and the purchase price is made without a bank loan or similar form of external financing, a Geographic Targeting Order (GTO) issued by the Financial Crimes Enforcement Network, U.S. Department of the Treasury, requires title companies to collect and report certain information about the Buyer, depending on where the Property is located. Buyer agrees to cooperate with the title company's effort to comply with the GTO.
- F.** Buyer shall, after Close Of Escrow, receive a recorded grant deed or any other conveyance document required to convey title (or, for stock cooperative or long-term lease, an assignment of stock certificate or of Seller's leasehold interest), including oil, mineral and water rights if currently owned by Seller. Title shall vest as designated in Buyer's vesting instructions. The recording document shall contain Buyer's post-closing mailing address to enable Buyer's receipt of the recorded conveyance document from the County Recorder. THE MANNER OF TAKING TITLE MAY HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES. CONSULT AN APPROPRIATE PROFESSIONAL.



FIGURE 6.3: Residential Purchase Agreement (continued)

- Property Address: _____ Date: _____
- G.** Buyer shall receive a "ALTA/CLTA Homeowner's Policy of Title Insurance" or equivalent policy of title insurance, if applicable to the type of property and buyer. Escrow Holder shall request this policy. If a ALTA/CLTA Homeowner's Policy of Title Insurance is not offered, Buyer shall receive a CLTA Standard Coverage policy unless Buyer has chosen another policy and instructed Escrow Holder in writing of the policy chosen and agreed to pay any increase in cost. Buyer should consult with the Title Company about the availability, and difference in coverage, and cost, if any, between a ALTA/CLTA Homeowner's Policy and a CLTA Standard Coverage policy and other title policies and endorsements. Buyer should receive notice from the Title Company on its Preliminary (Title) Report of the type of coverage offered. If Buyer is not notified on the Preliminary (Title) Report or is not satisfied with the policy offered, and Buyer nonetheless removes the contingency for Review of the Preliminary Report, Buyer will receive the policy as specified in this paragraph.
- 14. TIME PERIODS; REMOVAL OF CONTINGENCIES; CANCELLATION RIGHTS:** The following time periods may only be extended, altered, modified or changed by mutual written agreement. Any removal of contingencies or cancellation under this paragraph by either Buyer or Seller must be exercised in good faith and in writing (C.A.R. Form CR or CC).
- A. SELLER DELIVERY OF DOCUMENTS:** Seller shall, within the time specified in **paragraph 3N(1)**, Deliver to Buyer all reports, disclosures and information ("Reports") for which Seller is responsible as specified in **paragraphs 9B(6), 10, 11A, 11B, 11C, 11D, 11H, 11K, 11L, 11M, 13A, and 13D**.
- B. BUYER REVIEW OF DOCUMENTS; REPAIR REQUEST; CONTINGENCY REMOVAL OR CANCELLATION**
- (1) Buyer has the time specified in **paragraph 3** to: (i) perform Buyer Investigations; review all disclosures, reports, lease documents to be assumed by Buyer pursuant to **paragraph 9B(6)**, and other applicable information, which Buyer receives from Seller; and approve all matters affecting the Property; and (ii) Deliver to Seller Signed Copies of Statutory and Other Disclosures Delivered by Seller in accordance with **paragraph 11**.
 - (2) Buyer may, within the time specified in **paragraph 3L(3)**, request that Seller make repairs or take any other action regarding the Property (C.A.R. Form RR). Seller has no obligation to agree to or respond to Buyer's requests (C.A.R. Form RR or RRRR). If Seller does not agree or does not respond, Buyer is not contractually entitled to have the repairs or other requests made and may only cancel based on contingencies in this Agreement.
 - (3) Buyer shall, by the end of the times specified in **paragraph 3L** (or as Otherwise Agreed), Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement (C.A.R. Form CR or CC). However, if any report, disclosure, or information for which Seller is responsible, other than those in **paragraph 11A or 11B**, is not Delivered within the time specified in **paragraph 3N(1)**, then Buyer has **5 Days** after Delivery of any such items, or the times specified in **paragraph 3L**, whichever is later, to Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement. If Delivery of any Report occurs after a contractual contingency pertaining to that Report has already been waived or removed, the Delivery of the Report does not revive the contingency but there may be a right to terminate for a subsequent or amended disclosure under **paragraph 11G**.
 - (4) **Continuation of Contingency:** Even after the end of the time specified in **paragraph 3L** and before Seller cancels, if at all, pursuant to **paragraph 14C**, Buyer retains the right, in writing, to either (i) remove remaining contingencies, or (ii) cancel this Agreement based on a remaining contingency. Once Buyer's written removal of all contingencies is Delivered to Seller, Seller may not cancel this Agreement pursuant to **paragraph 14C(1)**.
- C. SELLER RIGHT TO CANCEL:**
- (1) **SELLER RIGHT TO CANCEL; BUYER CONTINGENCIES:** If, by the time specified in this Agreement, Buyer does not Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement, then Seller, after first Delivering to Buyer a Notice to Buyer to Perform (C.A.R. Form NBP), may cancel this Agreement. In such event, Seller shall authorize the return of Buyer's deposit, except for fees incurred by Buyer.
 - (2) **SELLER RIGHT TO CANCEL; BUYER CONTRACT OBLIGATIONS:** Seller, after first Delivering to Buyer a Notice to Buyer to Perform, may cancel this Agreement if, by the time specified in this Agreement, Buyer does not take the following action(s): (i) Deposit funds as required by **paragraph 3D(1)** or **3D(2)** or if the funds deposited pursuant to **paragraph 3D(1)** or **3D(2)** are not good when deposited; (ii) Deliver updated contact information for Buyer's lender(s) as required by **paragraph 5C(3)**; (iii) Deliver a notice of FHA or VA costs or terms, if any, as specified by **paragraph 5C(4)** (C.A.R. Form RR); (iv) Deliver verification, or a satisfactory verification if Seller reasonably disapproves of the verification already provided, as required by **paragraph 5B or 6A**; (v) Deliver a letter as required by **paragraph 6B**; (vi) In writing assume or accept leases or liens specified in **paragraph 8G**; (vii) Return Statutory and Other Disclosures as required by **paragraph 11F**; (viii) Cooperate with the title company's effort to comply with the GTO as required by **paragraph 13E**; (ix) Sign or initial a separate liquidated damages form for an increased deposit as required by **paragraphs 5A(2) and 29**; (x) Provide evidence of authority to Sign in a representative capacity as specified in **paragraph 28**; or (xi) Perform any additional Buyer contractual obligation(s) included in this Agreement. In such event, Seller shall authorize the return of Buyer's deposit, except for fees incurred by Buyer and other expenses already paid by Escrow Holder pursuant to this Agreement prior to Seller's cancellation.
 - (3) **SELLER RIGHT TO CANCEL; SELLER CONTINGENCIES:** Seller may cancel this Agreement by good faith exercise of any Seller contingency included in this Agreement, or Otherwise Agreed, so long as that contingency has not already been removed or waived in writing.
- D. BUYER RIGHT TO CANCEL:**
- (1) **BUYER RIGHT TO CANCEL; SELLER CONTINGENCIES:** If, by the time specified in this Agreement, Seller does not Deliver to Buyer a removal of the applicable contingency or cancellation of this Agreement, then Buyer, after first Delivering to Seller a Notice to Seller to Perform (C.A.R. Form NSF), may cancel this Agreement. In such event, Seller shall authorize the return of Buyer's deposit, except for fees incurred by Buyer and other expenses already paid by Escrow Holder pursuant to this Agreement prior to Buyer's cancellation.
 - (2) **BUYER RIGHT TO CANCEL; SELLER CONTRACT OBLIGATIONS:** If, by the time specified, Seller has not Delivered any item specified in **paragraph 3N(1)** or Seller has not performed any Seller contractual obligation included in this Agreement by the time specified, Buyer, after first Delivering to Seller a Notice to Seller to Perform, may cancel this Agreement.
 - (3) **BUYER RIGHT TO CANCEL; BUYER CONTINGENCIES:** Buyer may cancel this Agreement by good faith exercise of any Buyer contingency included in **paragraph 8**, or Otherwise Agreed, so long as that contingency has not already been removed in writing.



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____

Date: _____

- E. NOTICE TO BUYER OR SELLER TO PERFORM:** The Notice to Buyer to Perform or Notice to Seller to Perform shall: (i) be in writing; (ii) be Signed by the applicable Buyer or Seller; and (iii) give the other Party at least **2 Days** after Delivery (or until the time specified in the applicable paragraph, whichever occurs last) to take the applicable action. A Notice to Buyer to Perform or Notice to Seller to Perform may not be Delivered any earlier than **2 Days** prior to the Scheduled Performance Day to remove a contingency or cancel this Agreement or meet an obligation specified in **paragraph 14**, whether or not the Scheduled Performance Day falls on a Saturday, Sunday or legal holiday. If a Notice to Buyer to Perform or Notice to Seller to Perform is incorrectly Delivered or specifies a time less than the agreed time, the notice shall be deemed invalid and void, and Seller or Buyer shall be required to Deliver a new Notice to Buyer to Perform or Notice to Seller to Perform with the specified timeframe.
- F. EFFECT OF REMOVAL OF CONTINGENCIES:**
- (1) **REMOVAL OF BUYER CONTINGENCIES:** If Buyer removes any contingency or cancellation rights, unless Otherwise Agreed, Buyer shall conclusively be deemed to have: (i) completed all Buyer Investigations, and review of reports and other applicable information and disclosures pertaining to that contingency or cancellation right; (ii) elected to proceed with the transaction; and (iii) assumed all liability, responsibility and expense for the non-delivery of any reports, disclosures or information outside of Seller's control and for any Repairs or corrections pertaining to that contingency or cancellation right, or for the inability to obtain financing.
 - (2) **REMOVAL OF SELLER CONTINGENCIES:** If Seller removes any contingency or cancellation rights, unless Otherwise Agreed, Seller shall conclusively be deemed to have: (i) satisfied themselves regarding such contingency, (ii) elected to proceed with the transaction; and (iii) given up any right to cancel this Agreement based on such contingency.
- G. DEMAND TO CLOSE ESCROW:** Before Buyer or Seller may cancel this Agreement for failure of the other Party to close escrow pursuant to this Agreement, Buyer or Seller must first Deliver to the other Party a Demand to Close Escrow (C.A.R. Form DCE). The DCE shall: (i) be Signed by the applicable Buyer or Seller; and (ii) give the other Party at least **3 Days** after Delivery to close escrow. A DCE may not be Delivered any earlier than **3 Days** prior to the Scheduled Performance Day for the Close Of Escrow. If a DCE is incorrectly Delivered or specifies a time less than the above timeframe, the DCE shall be deemed invalid and void, and Seller or Buyer shall be required to Deliver a new DCE.
- H. EFFECT OF CANCELLATION ON DEPOSITS:** If Buyer or Seller gives written notice of cancellation pursuant to rights duly exercised under the terms of this Agreement, the Parties agree to Sign and Deliver mutual instructions to cancel the sale and escrow and release deposits, if any, to the Party entitled to the funds, less (i) fees and costs paid by Escrow Holder on behalf of that Party, if required by this Agreement; and (ii) any escrow cancellation fee charged to that party. Fees and costs may be payable to service providers and vendors for services and products provided during escrow. **A release of funds will require mutual Signed release instructions from the Parties, judicial decision or arbitration award. A Party may be subject to a civil penalty of up to \$1,000 for refusal to Sign cancellation instructions if no good faith dispute exists as to which Party is entitled to the deposited funds (Civil Code § 1057.3). Note: Neither Agents nor Escrow Holder are qualified to provide any opinion on whether either Party has acted in good faith or which Party is entitled to the deposited funds. Buyer and Seller are advised to seek the advice of a qualified California real estate attorney regarding this matter.**
- 15. REPAIRS:** Repairs shall be completed prior to final verification of condition unless Otherwise Agreed. Repairs to be performed at Seller's expense may be performed by Seller or through others, provided that the work complies with applicable Law, including governmental permit, inspection and approval requirements. Repairs shall be performed in a good, skillful manner with materials of quality and appearance comparable to existing materials. Buyer acknowledges that exact restoration of appearance or cosmetic items following all Repairs may not be possible. Seller shall: (i) obtain invoices and paid receipts for Repairs performed by others; (ii) prepare a written statement indicating the Repairs performed by Seller and the date of such Repairs; and (iii) provide Copies of invoices and paid receipts and statements to Buyer prior to final verification of condition.
- 16. FINAL VERIFICATION OF CONDITION:** Buyer shall have the right to make a final verification of the Property condition within the time specified in **paragraph 3J**, NOT AS A CONTINGENCY OF THE SALE, but solely to confirm: (i) the Property is maintained pursuant to **paragraph 7B**; (ii) Repairs have been completed as agreed; and (iii) Seller has complied with Seller's other obligations under this Agreement (C.A.R. Form VP).
- 17. PRORATIONS OF PROPERTY TAXES AND OTHER ITEMS:** Unless Otherwise Agreed, the following items shall be PAID CURRENT and prorated between Buyer and Seller as of Close Of Escrow: real property taxes and assessments, interest, Seller rental payments, HOA regular assessments due prior to Close Of Escrow, premiums on insurance assumed by Buyer, payments on bonds and assessments assumed by Buyer, and payments on Mello-Roos and other Special Assessment District bonds and assessments that are now a lien. Seller shall pay any HOA special or emergency assessments due prior to Close Of Escrow. The following items shall be assumed by Buyer WITHOUT CREDIT toward the purchase price: prorated payments on Mello-Roos and other Special Assessment District bonds and assessments and HOA special or emergency assessments that are due after Close Of Escrow. Property will be reassessed upon change of ownership. Any supplemental tax bills delivered to Escrow Holder prior to closing shall be prorated and paid as follows: (i) for periods after Close Of Escrow, by Buyer; and (ii) for periods prior to Close Of Escrow, by Seller (see C.A.R. Form SPT or SBSA for further information). Seller agrees all service fees, maintenance costs and utility bills will be paid current up and through the date of Close Of Escrow. **TAX BILLS AND UTILITY BILLS ISSUED AFTER CLOSE OF ESCROW SHALL BE HANDLED DIRECTLY BETWEEN BUYER AND SELLER. Prorations shall be made based on a 30-day month.**
- 18. BROKERS AND AGENTS:**
- A. COMPENSATION:** Seller or Buyer, or both, as applicable, agree to pay compensation to Broker as specified in a separate written agreement between Broker and that Seller or Buyer. Compensation is payable upon Close Of Escrow, or if escrow does not close, as otherwise specified in the agreement between Broker and that Seller or Buyer.
 - B. SCOPE OF DUTY:** Buyer and Seller acknowledge and agree that Agent: (i) Does not decide what price Buyer should pay or Seller should accept; (ii) Does not guarantee the condition of the Property; (iii) Does not guarantee the performance, adequacy or completeness of inspections, services, products or repairs provided or made by Seller or others; (iv) Does not have an obligation to conduct an inspection of common areas or areas off the site of the Property; (v) Shall not be responsible for identifying defects on the Property, in common areas, or offsite unless such defects are visually observable by an inspection of reasonably accessible areas of the Property or are known to Agent; (vi) Shall not be responsible for inspecting public records or permits concerning the title or use of Property; (vii) Shall not be responsible for identifying the location of boundary lines or other items affecting title; (viii) Shall not be responsible for verifying square footage, representations of others or information contained in Investigation reports, Multiple Listing Service, advertisements, flyers or other promotional material; (ix) Shall not be responsible for determining the fair market value of the Property or any personal property included in the sale; (x) Shall not be responsible for providing legal or tax advice regarding any aspect of a transaction entered into by Buyer or Seller; and (xi) Shall not be responsible for providing other advice or information that exceeds the knowledge, education and experience required to perform real estate licensed activity. Buyer and Seller agree to seek legal, tax, insurance, title and other desired assistance from appropriate professionals.



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____

Date: _____

19. JOINT ESCROW INSTRUCTIONS TO ESCROW HOLDER:

- A.** The following paragraphs, or applicable portions thereof, of this Agreement constitute the joint escrow instructions of Buyer and Seller to Escrow Holder, which Escrow Holder is to use along with any related counter offers and addenda, and any additional mutual instructions to close the escrow: **paragraphs 1, 3A, 3B, 3D-G, 3N(2), 3Q, 3R, 4A, 4B, 5A(1-2) 5D, 5E, 10B(2)(A), 10B(3), 10C, 11H, 11K(2), 13 (except 13D), 14H, 17, 18A, 19, 23, 25, 27, 28, 32, 33, and paragraph 3 of the Real Estate Brokers Section.** If a Copy of the separate compensation agreement(s) provided for in **paragraph 18A or paragraph 3 of the Real Estate Brokers Section** is deposited with Escrow Holder by Agent, Escrow Holder shall accept such agreement(s) and pay out from Buyer's or Seller's funds, or both, as applicable, the Broker's compensation provided for in such agreement(s). The terms and conditions of this Agreement not set forth in the specified paragraphs are additional matters for the information of Escrow Holder, but about which Escrow Holder need not be concerned.
- B.** Buyer and Seller will receive Escrow Holder's general provisions, if any, directly from Escrow Holder. To the extent the general provisions are inconsistent or conflict with this Agreement, the general provisions will control as to the duties and obligations of Escrow Holder only. Buyer and Seller shall Sign and return Escrow Holder's general provisions or supplemental instructions within the time specified in **paragraph 3N(2).** Buyer and Seller shall execute additional instructions, documents and forms provided by Escrow Holder that are reasonably necessary to close the escrow and, as directed by Escrow Holder, within **3 Days**, shall pay to Escrow Holder or HOA or HOA management company or others any fee required by **paragraphs 3, 8, 10, 11,** or elsewhere in this Agreement.
- C.** A Copy of this Agreement including any counter offer(s) and addenda shall be delivered to Escrow Holder within **3 Days** after Acceptance. Buyer and Seller authorize Escrow Holder to accept and rely on Copies and Signatures as defined in this Agreement as originals, to open escrow and for other purposes of escrow. The validity of this Agreement as between Buyer and Seller is not affected by whether or when Escrow Holder Signs this Agreement. Escrow Holder shall provide Seller's Statement of Information to Title Company when received from Seller, if a separate company is providing title insurance. If Seller delivers an affidavit to Escrow Holder to satisfy Seller's FIRPTA obligation under **paragraph 11H,** Escrow Holder shall deliver to Buyer, Buyer's Agent, and Seller's Agent a Qualified Substitute statement that complies with federal Law. If Escrow Holder's Qualified Substitute statement does not comply with federal law, the Parties instruct escrow to withhold all applicable required amounts under **paragraph 11H.**
- D.** Agents are not a party to the escrow, except for Brokers for the sole purpose of compensation pursuant to **paragraph 18A and paragraph 3 of the Real Estate Brokers Section.** If a Copy of the separate compensation agreement(s) provided for in either of those paragraphs is deposited with Escrow Holder by Agent, Escrow Holder shall accept such agreement(s) and pay out from Buyer's or Seller's funds, or both, as applicable, the Broker's compensation provided for in such agreement(s). Buyer and Seller irrevocably assign to Brokers compensation specified in **paragraph 18A,** and irrevocably instruct Escrow Holder to disburse those funds to Brokers at Close Of Escrow or pursuant to any other mutually executed cancellation agreement. Compensation instructions can be amended or revoked only with the written consent of Brokers. Buyer and Seller shall release and hold harmless Escrow Holder from any liability resulting from Escrow Holder's payment to Broker(s) of compensation pursuant to this Agreement.
- E.** Buyer and Seller acknowledge that Escrow Holder may require invoices for expenses under this Agreement. Buyer and Seller, upon request by Escrow Holder, within **3 Days** or within a sufficient time to close escrow, whichever is sooner, shall provide any such invoices to Escrow Holder.
- F.** Upon receipt, Escrow Holder shall provide Buyer, Seller, and each Agent verification of Buyer's deposit of funds pursuant to **paragraphs 5A(1) and 5A(2).** Once Escrow Holder becomes aware of any of the following, Escrow Holder shall immediately notify each Agent: **(i)** if Buyer's initial or any additional deposit or down payment is not made pursuant to this Agreement, or is not good at time of deposit with Escrow Holder; or **(ii)** if Buyer and Seller instruct Escrow Holder to cancel escrow.
- G.** A Copy of any amendment that affects any paragraph of this Agreement for which Escrow Holder is responsible shall be delivered to Escrow Holder within **3 Days** after mutual execution of the amendment.
- 20. SELECTION OF SERVICE PROVIDERS:** Agents do not guarantee the performance of any vendors, service or product providers ("Providers"), whether referred by Agent or selected by Buyer, Seller or other person. Buyer and Seller may select ANY Providers of their own choosing.
- 21. MULTIPLE LISTING SERVICE ("MLS"):** Agents are authorized to report to the MLS that an offer has been accepted and, upon Close Of Escrow, the sales price and other terms of this transaction shall be provided to the MLS to be published and disseminated to persons and entities authorized to use the information on terms approved by the MLS. Buyer acknowledges that: **(i)** any pictures, videos, floor plans (collectively, "Images") or other information about the Property that has been or will be inputted into the MLS or internet portals, or both, at the instruction of Seller or in compliance with MLS rules, will not be removed after Close Of Escrow; **(ii)** California Civil Code § 1088(c) requires the MLS to maintain such Images and information for at least three years and as a result they may be displayed or circulated on the Internet, which cannot be controlled or removed by Seller or Agents; and **(iii)** Seller, Seller's Agent, Buyer's Agent, and MLS have no obligation or ability to remove such Images or information from the Internet.
- 22. ATTORNEY FEES AND COSTS:** In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in **paragraph 30A.**
- 23. ASSIGNMENT:** Buyer shall have the right to assign all of Buyer's interest in this Agreement to Buyer's own trust or to any wholly owned entity of Buyer that is in existence at the time of such assignment. Otherwise, Buyer shall not assign all or any part of Buyer's interest in this Agreement without first having obtained the separate written consent of Seller to a specified assignee. Such consent shall not be unreasonably withheld. Prior to any assignment, Buyer shall disclose to Seller the name of the assignee and the amount of any monetary consideration between Buyer and assignee. Buyer shall provide assignee with all documents related to this Agreement including, but not limited to, the Agreement and any disclosures. If assignee is a wholly owned entity or trust of Buyer, that assignee does not need to re-sign or initial all documents provided. Whether or not an assignment requires seller's consent, at the time of assignment, assignee shall deliver a letter from assignee's lender that assignee is prequalified or preapproved as specified in **paragraph 6B.** Should assignee fail to deliver such a letter, Seller, after first giving Assignee an Notice to Buyer to Perform, shall have the right to terminate the assignment. Buyer shall, within the time specified in **paragraph 3K,** Deliver any request to assign this Agreement for Seller's consent. If Buyer fails to provide the required information within this time frame, Seller's withholding of consent shall be deemed reasonable. Any total or partial assignment shall not relieve Buyer of Buyer's obligations pursuant to this Agreement unless Otherwise Agreed by Seller (C.A.R. Form A0AA).
- 24. EQUAL HOUSING OPPORTUNITY:** The Property is sold in compliance with federal, state and local anti-discrimination Laws.
- 25. DEFINITIONS and INSTRUCTIONS:** The following words are defined terms in this Agreement, shall be indicated by initial capital letters throughout this Agreement, and have the following meaning whenever used:
- A. "Acceptance"** means the time the offer or final counter offer is fully executed, in writing, by the recipient Party and is Delivered to the offering Party or that Party's Authorized Agent.



FIGURE 6.3: Residential Purchase Agreement (continued)

- Property Address: _____ Date: _____
- B. **"Agent"** means the Broker, salesperson, broker-associate or any other real estate licensee licensed under the brokerage firm identified in **paragraph 2B**.
- C. **"Agreement"** means this document and any counter offers and any incorporated addenda or amendments, collectively forming the binding agreement between the Parties. Addenda and amendments are incorporated only when Signed and Delivered by all Parties.
- D. **"As-Is"** condition: Seller shall disclose known material facts and defects as specified in this Agreement. Buyer has the right to inspect the Property and, within the time specified, request that Seller make repairs or take other corrective action, or exercise any contingency cancellation rights in this Agreement. Seller is only required to make repairs specified in this Agreement or as Otherwise Agreed.
- E. **"Authorized Agent"** means an individual real estate licensee specified in the Real Estate Broker Section.
- F. **"C.A.R. Form"** means the most current version of the specific form referenced or another comparable form agreed to by the Parties.
- G. **"Close Of Escrow"**, including **"COE"**, means the date the grant deed, or other evidence of transfer of title, is recorded for any real property, or the date of Delivery of a document evidencing the transfer of title for any non-real property transaction.
- H. **"Copy"** means copy by any means including photocopy, facsimile and electronic.
- I. **"Counting Days"** is done as follows unless Otherwise Agreed: (1) The first Day after an event is the first full calendar date following the event, and ending at 11:59 pm. For example, if a Notice to Buyer to Perform (C.A.R. form NBP) is Delivered at 3 pm on the 7th calendar day of the month, or Acceptance of a counter offer is personally received at 12 noon on the 7th calendar day of the month, then the 7th is Day "0" for purposes of counting days to respond to the NBP or calculating the Close Of Escrow date or contingency removal dates and the 8th of the month is Day 1 for those same purposes. (2) All calendar days are counted in establishing the first Day after an event. (3) All calendar days are counted in determining the date upon which performance must be completed, ending at 11:59 pm on the last day for performance ("Scheduled Performance Day"). (4) After Acceptance, if the Scheduled Performance Day for any act required by this Agreement, including Close Of Escrow, lands on a Saturday, Sunday, or legal holiday, the performing party shall be allowed to perform on the next day that is not a Saturday, Sunday or legal holiday ("Allowable Performance Day"), and ending at 11:59 pm. (5) For the purposes of COE, any day that the Recorder's office in the County where the Property is located is closed, the COE shall occur on the next day the Recorder's office in that County is open. (6) COE is considered Day 0 for purposes of counting days Seller is allowed to remain in possession, if permitted by this Agreement.
- J. **"Day"** or **"Days"** means calendar day or days. However, delivery of deposit to escrow is based on business days.
- K. **"Deliver"**, **"Delivered"** or **"Delivery"** of documents, unless Otherwise Agreed, means and shall be effective upon personal receipt of the document by Buyer or Seller or their Authorized Agent. Personal receipt means (i) a Copy of the document, or as applicable, link to the document, is in the possession of the Party or Authorized Agent, regardless of the Delivery method used (i.e. e-mail, text, other), or (ii) an Electronic Copy of the document, or as applicable, link to the document, has been sent to any of the designated electronic delivery addresses specified in the Real Estate Broker Section on page 16. After Acceptance, Agent may change the designated electronic delivery address for that Agent by, in writing, Delivering notice of the change in designated electronic delivery address to the other Party. Links could be, for example, to DropBox or GoogleDrive or other functionally equivalent program. If the recipient of a link is unable or unwilling to open the link or download the documents or otherwise prefers Delivery of the documents directly, Recipient of a link shall notify the sender in writing, within **3 Days** after Delivery of the link (C.A.R. Form RFR). In such case, Delivery shall be effective upon Delivery of the documents and not the link. Failure to notify sender within the time specified above shall be deemed consent to receive, and Buyer opening, the document by link.
- L. **"Electronic Copy"** or **"Electronic Signature"** means, as applicable, an electronic copy or signature complying with California Law. Buyer and Seller agree that electronic means will not be used by either Party to modify or alter the content or integrity of this Agreement without the knowledge and consent of the other Party.
- M. **"Law"** means any law, code, statute, ordinance, regulation, rule or order, which is adopted by a controlling city, county, state or federal legislative, judicial or executive body or agency.
- N. **"Legally Authorized Signer"** means an individual who has authority to Sign for the principal as specified in **paragraph 32** or **paragraph 33**.
- O. **"Otherwise Agreed"** means an agreement in writing, signed by both Parties and Delivered to each.
- P. **"Repairs"** means any repairs (including pest control), alterations, replacements, modifications or retrofitting of the Property provided for under this Agreement.
- Q. **"Sign"** or **"Signed"** means either a handwritten or Electronic Signature on an original document, Copy or any counterpart.
26. **TERMS AND CONDITIONS OF OFFER:** This is an offer to purchase the Property on the terms and conditions herein. The individual Liquidated Damages and Arbitration of Disputes paragraphs are incorporated in this Agreement if initialed by all Parties or if incorporated by mutual agreement in a Counter Offer or addendum. **If at least one but not all Parties initial, a Counter Offer is required until agreement is reached.** Seller has the right to continue to offer the Property for sale and to accept any other offer at any time prior to notification of Acceptance and to market the Property for backup offers after Acceptance. The Parties have read and acknowledge receipt of a Copy of the offer and agree to the confirmation of agency relationships. If this offer is accepted and Buyer subsequently defaults, Buyer may be responsible for payment of Brokers' compensation. This Agreement and any supplement, addendum or modification, including any Copy, may be Signed in two or more counterparts, all of which shall constitute one and the same writing. By signing this offer or any document in the transaction, the Party Signing the document is deemed to have read the document in its entirety.
27. **TIME OF ESSENCE; ENTIRE CONTRACT; CHANGES:** Time is of the essence. All understandings between the Parties are incorporated in this Agreement. Its terms are intended by the Parties as a final, complete and exclusive expression of their Agreement with respect to its subject matter and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. Except as Otherwise Agreed, this Agreement shall be interpreted, and disputes shall be resolved in accordance with the Laws of the State of California. **Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed, except in writing Signed by Buyer and Seller.**
28. **LEGALLY AUTHORIZED SIGNER:** Wherever the signature or initials of the Legally Authorized Signer identified in **paragraph 32** or **33** appear on this Agreement or any related documents, it shall be deemed to be in a representative capacity for the entity described and not in an individual capacity, unless otherwise indicated. The Legally Authorized Signer (i) represents that the entity for which that person is acting already exists and is in good standing to do business in California and (ii) shall Deliver to the other Party and Escrow Holder, within the time specified in **paragraph 3N(5)**, evidence of authority to act in that capacity (such as but not limited to: applicable portion of the trust or Certification Of Trust (Probate Code § 18100.5), letters testamentary, court order, power of attorney, corporate resolution, or formation documents of the business entity).



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____	Date: _____
-------------------------	-------------

29. LIQUIDATED DAMAGES (By initialing in the space below, you are agreeing to Liquidated Damages):
 If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain, as liquidated damages, the deposit actually paid. If the Property is a dwelling with no more than four units, one of which Buyer intends to occupy, then the amount retained shall be no more than 3% of the purchase price. Any excess shall be returned to Buyer. Release of funds will require mutual, Signed release instructions from both Buyer and Seller, judicial decision or arbitration award. **AT THE TIME OF ANY INCREASED DEPOSIT BUYER AND SELLER SHALL SIGN A SEPARATE LIQUIDATED DAMAGES PROVISION INCORPORATING THE INCREASED DEPOSIT AS LIQUIDATED DAMAGES (C.A.R. FORM DID).**

Buyer's Initials _____ / _____ Seller's Initials _____ / _____

30. MEDIATION:

A. The Parties agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. The mediation shall be conducted through the C.A.R. Real Estate Mediation Center for Consumers (www.consumermediation.org) or through any other mediation provider or service mutually agreed to by the Parties. The Parties also agree to mediate any disputes or claims with Agents(s), who, in writing, agree to such mediation prior to, or within a reasonable time after, the dispute or claim is presented to the Agent. Mediation fees, if any, shall be divided equally among the Parties involved, and shall be recoverable under the prevailing party attorney fees clause. If, for any dispute or claim to which this paragraph applies, any Party (i) commences an action without first attempting to resolve the matter through mediation, or (ii) before commencement of an action, refuses to mediate after a request has been made, then that Party shall not be entitled to recover attorney fees, even if they would otherwise be available to that Party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED.

B. **ADDITIONAL MEDIATION TERMS:** (i) Exclusions from this mediation agreement are specified in paragraph 31B; (ii) The obligation to mediate does not preclude the right of either Party to seek a preservation of rights under paragraph 31C; and (iii) Agent's rights and obligations are further specified in paragraph 31D. These terms apply even if the Arbitration of Disputes paragraph is not initialed.

31. ARBITRATION OF DISPUTES:

A. The Parties agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration. The Parties also agree to arbitrate any disputes or claims with Agents(s), who, in writing, agree to such arbitration prior to, or within a reasonable time after, the dispute or claim is presented to the Agent. The arbitration shall be conducted through any arbitration provider or service mutually agreed to by the Parties, OR ☐ _____ . The arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of residential real estate Law experience, unless the Parties mutually agree to a different arbitrator. Enforcement of, and any motion to compel arbitration pursuant to, this agreement to arbitrate shall be governed by the procedural rules of the Federal Arbitration Act, and not the California Arbitration Act, notwithstanding any language seemingly to the contrary in this Agreement. The Parties shall have the right to discovery in accordance with Code of Civil Procedure § 1283.05. The arbitration shall be conducted in accordance with Title 9 of Part 3 of the Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction.

B. **EXCLUSIONS:** The following matters are excluded from mediation and arbitration: (i) Any matter that is within the jurisdiction of a probate, small claims or bankruptcy court; (ii) an unlawful detainer action; and (iii) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code § 2985.

C. **PRESERVATION OF ACTIONS:** The following shall not constitute a waiver nor violation of the mediation and arbitration provisions: (i) the filing of a court action to preserve a statute of limitations; (ii) the filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies; or (iii) the filing of a mechanic's lien.

D. **AGENTS:** Agents shall not be obligated nor compelled to mediate or arbitrate unless they agree to do so in writing. Any Agents(s) participating in mediation or arbitration shall not be deemed a party to this Agreement.

E. **"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."**

Buyer's Initials _____ / _____ Seller's Initials _____ / _____

FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____ Date: _____

32. BUYER'S OFFER

A. EXPIRATION OF OFFER: This offer shall be deemed revoked and the deposit, if any, shall be returned to Buyer unless by the date and time specified in **paragraph 3C**, the offer is Signed by Seller and a Copy of the Signed offer is Delivered to Buyer or Buyer's Authorized Agent. **Seller has no obligation to respond to an offer made.**

B. ☐ ENTITY BUYERS: (Note: If this paragraph is completed, a Representative Capacity Signature Disclosure (C.A.R. Form RCSD) is not required for the Legally Authorized Signers designated below.)

- (1) One or more Buyers is a trust, corporation, LLC, probate estate, partnership, holding a power of attorney or other entity.
- (2) This Agreement is being Signed by a Legally Authorized Signer in a representative capacity and not in an individual capacity. See **paragraph 28** for additional terms.
- (3) The name(s) of the Legally Authorized Signer(s) is/are: _____.
- (4) If a trust, identify Buyer as trustee(s) of the trust or by simplified trust name (ex. John Doe, co-trustee, Jane Doe, co-trustee or Doe Revocable Family Trust). If the entity is a trust or under probate, the following is the full name of the trust or probate case, including case #: _____.

C. The RPA has 16 pages. Buyer acknowledges receipt of, and has read and understands, every page and all attachments that make up the Agreement.

D. BUYER SIGNATURE(S):

(Signature) By, _____ **Date:** _____

Printed name of BUYER: _____

☐ Printed Name of Legally Authorized Signer: _____ Title, if applicable, _____

(Signature) By, _____ **Date:** _____

Printed name of BUYER: _____

☐ Printed Name of Legally Authorized Signer: _____ Title, if applicable, _____

☐ IF MORE THAN TWO SIGNERS, USE Additional Signature Addendum (C.A.R. Form ASA).

33. ACCEPTANCE

A. ACCEPTANCE OF OFFER: Seller warrants that Seller is the owner of the Property or has the authority to execute this Agreement. Seller accepts the above offer and agrees to sell the Property on the above terms and conditions. Seller has read and acknowledges receipt of a Copy of this Agreement and authorizes Agent to Deliver a Signed Copy to Buyer.

Seller's acceptance is subject to the attached Counter Offer or Back-Up Offer Addendum, or both, checked below. Seller shall return and include the entire agreement with any response.

☐ **Seller Counter Offer** (C.A.R. Form SCO or SMCO)

☐ **Back-Up Offer Addendum** (C.A.R. Form BUO)

B. ☐ Entity Sellers: (Note: If this paragraph is completed, a Representative Capacity Signature Disclosure form (C.A.R. Form RCSD) is not required for the Legally Authorized Signers designated below.)

- (1) One or more Sellers is a trust, corporation, LLC, probate estate, partnership, holding a power of attorney or other entity.
- (2) This Agreement is being Signed by a Legally Authorized Signer in a representative capacity and not in an individual capacity. See **paragraph 28** for additional terms.
- (3) The name(s) of the Legally Authorized Signer(s) is/are: _____.
- (4) If a trust, identify Seller as trustee(s) of the trust or by simplified trust name (ex. John Doe, co-trustee, Jane Doe, co-trustee or Doe Revocable Family Trust). If the entity is a trust or under probate, the following is the full name of the trust or probate case, including case #: _____.

C. The RPA has 16 pages. Seller acknowledges receipt of, and has read and understands, every page and all attachments that make up the Agreement.

D. SELLER SIGNATURE(S):

(Signature) By, _____ **Date:** _____

Printed name of SELLER: _____

☐ Printed Name of Legally Authorized Signer: _____ Title, if applicable, _____

(Signature) By, _____ **Date:** _____

Printed name of SELLER: _____

☐ Printed Name of Legally Authorized Signer: _____ Title, if applicable, _____

☐ IF MORE THAN TWO SIGNERS, USE Additional Signature Addendum (C.A.R. Form ASA).

OFFER NOT ACCEPTED: _____ / _____ No Counter Offer is being made. This offer was not accepted by Seller _____ (date)
Seller's Initials



FIGURE 6.3: Residential Purchase Agreement (continued)

Property Address: _____ Date: _____

REAL ESTATE BROKERS SECTION:

1. Real Estate Agents are not parties to the Agreement between Buyer and Seller.
2. Agency relationships are confirmed as stated in paragraph 2.
3. **Cooperating Broker Compensation:** Seller's Broker agrees to pay Buyer's Broker and Buyer's Broker agrees to accept, out of Seller's Broker's proceeds in escrow, the amount specified in the MLS, provided Buyer's Broker is a Participant of the MLS in which the Property is offered for sale or a reciprocal MLS. If Seller's Broker and Buyer's Broker are not both Participants of the MLS, or a reciprocal MLS, in which the Property is offered for sale, then compensation must be specified in a separate written agreement (C.A.R. Form CBC). Declaration of License and Tax (C.A.R. Form DLT) may be used to document that tax reporting will be required or that an exemption exists.
4. **Presentation of Offer:** Pursuant to the National Association of REALTORS® Standard of Practice 1-7, if Buyer's Agent makes a written request, Seller's Agent shall confirm in writing that this offer has been presented to Seller.
5. **Agents' Signatures and designated electronic delivery address:**

- A. Buyer's Brokerage Firm** _____ Lic. # _____
- By _____ Lic. # _____ Date _____
- By _____ Lic. # _____ Date _____
- ☐ More than one agent from the same firm represents Buyer. Additional Agent Acknowledgement (C.A.R. Form AAA) attached.
- ☐ More than one brokerage firm represents Buyer. Additional Broker Acknowledgement (C.A.R. Form ABA) attached.

Designated Electronic Delivery Address(es):

Email _____ Text # _____

Alternate: _____

☐ if checked, Delivery shall be made to the alternate designated electronic delivery address only.

Address _____ City _____ State _____ Zip _____

- B. Seller's Brokerage Firm** _____ Lic. # _____
- By _____ Lic. # _____ Date _____
- By _____ Lic. # _____ Date _____
- ☐ More than one agent from the same firm represents Seller. Additional Agent Acknowledgement (C.A.R. Form AAA) attached.
- ☐ More than one brokerage firm represents Seller. Additional Broker Acknowledgement (C.A.R. Form ABA) attached.

Designated Electronic Delivery Address(es) (To be filled out by Seller's Agent):

Email _____ Text # _____

Alternate: _____

☐ if checked, Delivery shall be made to the alternate designated electronic delivery address only.

Address _____ City _____ State _____ Zip _____

ESCROW HOLDER ACKNOWLEDGMENT:

Escrow Holder acknowledges receipt of a Copy of this Agreement, (if checked, ☐ a deposit in the amount of \$ _____), Counter Offer numbers _____ and _____, and agrees to act as Escrow Holder subject to **paragraph 19** of this Agreement, any supplemental escrow instructions and the terms of Escrow Holder's general provisions.

Escrow Holder is advised by _____ that the date of Acceptance of the Agreement is _____

Escrow Holder _____ Escrow # _____

By _____ Date _____

Address _____

Phone/Fax/E-mail _____

Escrow Holder has the following license number # _____

☐ Department of Financial Protection and Innovation, ☐ Department of Insurance, ☐ Department of Real Estate.

PRESENTATION OF OFFER: _____ / _____ Seller's Brokerage Firm presented this offer to Seller on _____ (date).

Agent or Seller Initials

© 2021, California Association of REALTORS®, Inc. United States copyright law (Title 17 U.S. Code) forbids the unauthorized distribution, display and reproduction of this form, or any portion thereof, by photocopy machine or any other means, including facsimile or computerized formats. THIS FORM HAS BEEN APPROVED BY THE CALIFORNIA ASSOCIATION OF REALTORS®. NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OR ACCURACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE TRANSACTIONS. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL. This form is made available to real estate professionals through an agreement with or purchase from the California Association of REALTORS®. It is not intended to identify the user as a REALTOR®. REALTOR® is a registered collective membership mark which may be used only by members of the NATIONAL ASSOCIATION OF REALTORS® who subscribe to its Code of Ethics.

Published and Distributed by:
REAL ESTATE BUSINESS SERVICES, LLC.
 a subsidiary of the **CALIFORNIA ASSOCIATION OF REALTORS®**
 525 South Virgil Avenue, Los Angeles, California 90020

RPA 12/21 (PAGE 16 OF 16)

Buyer's Initials _____ / _____ Seller's Initials _____ / _____



Paragraph 12: Buyer investigation of property and matters affecting property. This sets forth the buyer's rights to conduct inspections and tests and states that utilities will be on for the inspection. The seller agrees to disclose any problems or defects. The buyer agrees to indemnify the seller for any damage or injury resulting from the inspection as well as to keep the property free of liens from work or inspection.

Paragraph 13: Title and vesting. This provides for a preliminary title report to be furnished to the buyer that title is to be taken in the present condition, the seller's duty to disclose matters affecting title, as well as that the title will pass by grant deed. The buyer is notified that the manner of taking title can have legal and tax consequences so the buyer should consult a professional. The paragraph also provides for the buyer to receive title insurance.

Paragraph 14: Time periods, removal of contingencies, and cancellation rights. This paragraph covers time periods for disclosure and compliance. Modification of time periods must be in writing. Removal of contingencies will be conclusive evidence of the buyer's intent to proceed with the transaction. If parties agree to cancellation, release of funds requires a mutual signed agreement with civil penalties up to \$1,000 for refusal to sign in the absence of a good-faith dispute.

Paragraph 15: Repairs. This provides that seller repairs will be before final verification of condition and work will be done properly and in accordance with applicable law.

Paragraph 16: Final verification of condition. This provides for a final inspection of the property before close of escrow to determine if the property has been maintained and that the seller has completed agreed-upon repairs and complied with other obligations.

Paragraph 17: Proration of property taxes and other items. This provides that those taxes and assessments will be paid current and prorated.

Paragraph 18: Brokers and agents. This provides for broker compensation from the seller or buyer (where broker represents buyer) as well as the scope of the broker's duties.

Paragraph 19: Joint escrow instructions to escrow holder. This provides that paragraphs of this agreement constitute joint escrow instructions but that the broker's compensation can only be amended with broker's agreement.

Paragraph 20: Selection of service providers. This provides that brokers do not guarantee performance of any service provider referred by a broker or any other party. Parties may choose any service providers.

Paragraph 21: Multiple listing service (MLS). The broker is given the right to report sale terms to the MLS for publication.

Paragraph 22: Attorney fees and costs. This provides that in the event of any legal action or arbitration, the prevailing party will be entitled to reasonable attorney fees (this paragraph also serves to reduce the likelihood of frivolous lawsuits).

Paragraph 23: Assignment. The buyer agrees not to assign any part of the agreement without the written consent of the seller as to the assignee.

Paragraph 24: Equal housing opportunity. This asserts that the sale is in compliance with fair housing laws.

Paragraph 25: Definition and instructions. This provides the definitions of terms used.

CASE STUDY The case of *Paul v. Schoellkopf* (2005) 128 C.A.4th 147 involved a successful plaintiff's entitlement to attorney fees. While the purchase contract did not have any provision for attorney fees, the escrow instructions signed by the parties did include an attorney-fee clause. The Los Angeles Superior Court awarded damages to the plaintiff totaling \$105,499.92, as well as attorney fees of \$371,942.

The Court of Appeal affirmed the award of monetary damages but reversed on the award of plaintiff's attorney fees. The court ruled that the attorney-fee clause in the escrow agreement only applied to an escrow dispute, not any dispute involving enforcement of details of the purchase agreement.

Note: For attorney fees to be awarded, there must be an attorney-fee clause in the documents that are the basis of the lawsuit, not in a separate document that is not involved in the dispute.

Paragraph 26: Terms and conditions of offer. This reiterates that this is an offer to purchase. Paragraphs requiring initials of the parties must be initialed by all parties to be incorporated in the agreement. The seller can continue to offer property until notified of acceptance of any counteroffer. If the buyer defaults, the buyer may be responsible for paying the broker's commission.

Paragraph 27: Time is of the essence—entire contract, changes. This is the entire agreement. It cannot be extended, amended, modified, altered, or changed without the buyer's and seller's signatures.

Paragraph 28: Legally authorized signer. If a signer is acting as a representative, he or she shall provide evidence of his or her authority.

Paragraph 29: Liquidated damages. This covers liquidated damages if the buyer defaults, as well as the statutory limit if the buyer intended to occupy the property. This provision is to be initialed by both parties.

Paragraph 30: Mediation. This sets forth an agreement to mediate disputes.

Paragraph 31: Arbitration of disputes. If parties agree, they will have binding arbitration of disputes.

Paragraph 32: Buyer's offer. The offer shall be considered revoked if not delivered to the buyer within the stated time for acceptance. A checked block provides the entity buyer and the authorized representative. The buyer must sign the offer.

Paragraph 33: Provides for seller acceptance.

The CAR form includes a confirmation of acceptance and agreement if the broker is to pay cooperating broker compensation. The escrow holder acknowledges receipt of the agreement and the deposit.

If a purchase offer fails to provide a period for acceptance, the offer will terminate after the expiration of a “reasonable period of time.” Because an offeror normally does not receive consideration to keep an offer open, the offer can be withdrawn by the offeror any time before acceptance even if the offeror agreed to keep the offer open for a stated period.

Additions to the Purchase Agreement

Contingencies Offers to purchase often are contingent on something happening, such as receiving an appraisal for a stated amount or more, obtaining a loan to stated specifications, or the sale or purchase of another property. The most common contingency is an offer contingent on financing.

When an offer is contingent on financing, failure of the buyer to use good faith in seeking financing would be a breach of contract. See *Fry v. George Elkins Company* (1958) 162 C.A.2d 256 for an example of this.

Contingencies can tie up a property for months. To avoid such a situation, the seller would be in a better position to agree to a contingency that allows the seller to continue to offer the property. A subsequent offer could be accepted, conditioned on the original buyer’s waiving a contingency within a stated period. If the original buyer fails to waive the contingency, that buyer’s offer becomes null and void and the deposit is returned.

A contingency can be removed by signing a Removal of Contingency form.

The person who benefits from a contingency can always waive the contingency. For example, if an offer were contingent on an appraisal of \$500,000 by a lender, the offeror could waive this contingency and go ahead with the purchase if the appraisal comes in for a lower amount. The refusal to waive a contingency that cannot be corrected would end the agreement.

CASE STUDY In *Beverly Way Associates v. Barham* (1990) 226 C.A.3d 49, a buyer of a \$3,900,000 apartment building had a purchase agreement that provided the buyer with the contingency to approve specified documents. The ALTA survey showed an electrical room that reduced parking by one space from what had been shown on a tract map. The buyer wrote to the seller, “We reluctantly disapprove of the matters disclosed on the survey and relating to the property.” The letter later stated, “Advise as to how you wish to proceed with this transaction.” The seller did not answer. The buyer later agreed to waive the objections. When the seller refused to sell, the buyer filed a *lis pendens*, a notice of a pending lawsuit regarding a claim involving an interest in a property. The court held that the buyer had a right not to consummate the purchase as long as he acted reasonably. However, once the agreement was rejected, the contract was terminated and the buyer could not later waive its objection even though the contract lacked a “time is of the essence” clause.

CASE STUDY An offer provided five days for acceptance in the case of *Sabo v. Fasano* (1984) 154 C.A.3d 502. The offer was accepted on the sixth day. The buyer and the seller then opened escrow. The seller later refused to sell, claiming that there was no contract because acceptance came after the five-day period. The court held that in this case, the time limit for acceptance was for the benefit of the offeror, not the offeree. The offeror waived the right to object to the late acceptance by opening escrow. Upon the waiver, both buyer and seller were bound to the agreement.

“As Is” Clause

An “as is” clause in a purchase agreement can lead to problems. As discussed in Unit 3, “as is” generally applies only to patent defects, which are obvious defects, and not to latent or hidden defects known by the seller and/or agent.

A seller who wishes to sell “as is” should make a full disclosure of all defects known to the seller and state that additional defects, which the seller is unaware of, may be found. A seller who is not familiar with the property for any reason (such as occupancy by tenants) should disclose this fact. Doing so puts purchasers on notice that they cannot rely on the very limited knowledge of the seller.

The “as is” clause also should provide a right of the purchaser to inspect the property within a stated number of days and communicate any defects to the seller. The seller then should have the option to cure the defects within a stated period or return the buyer’s deposit. The parties also could agree to a change in price, or the purchaser could waive the defect.

If “as is” is to be enforceable as to defects discovered later, full disclosure is important, and the buyer should be given not just the right but also the responsibility to inspect. Com-

mercial property is treated differently from residential property regarding the effect of an “as is” clause. “As is” can protect a commercial seller who fails to disclose defects but is not guilty of fraud or concealment of the defects. See *Shapiro v. Hu* (1986) 188 C.A.3d 324 for an example of this.

Interim occupancy agreement At times, a buyer will be given possession before closing. It must be fully understood that the buyer’s position is as a renter and not as a buyer taking early possession.

If a buyer discovered a problem such as a defect, the buyer conceivably could delay closing for many months without payment of rent if the buyer was not clearly a renter. Allowing even a few days’ early occupancy could create enormous problems.

An **interim occupancy agreement**, such as CAR form 10A-11, makes it clear that the buyer is in possession as a renter. If the sale is not completed on its designated date, the form allows a different rental amount. By setting an amount that is fairly high, but not so high as to be regarded as a penalty, the buyer is encouraged not to delay the purchase.

Counteroffer As discussed in Unit 5, an acceptance that varies from the original offer on a material term is considered a counteroffer, which is a rejection of the original offer. California Association of REALTORS® Counter Offer (CO-11) Form can be used as a counter to an offer, an exchange agreement, or even another counteroffer.

When separate forms are signed and dated individually for each counteroffer, it is called multiple offers. The California Association of REALTORS® has created a form for this situation called the Seller Multiple Counter Offer (SMCO). It is designed to provide for the process of the sequence of negotiations so the final agreement will be clear.

Cancellation of contract The parties to a purchase agreement can agree to release each other from the contract. The agreement could provide for a full return of the deposit to the offeror (a rescission) or a forfeiture of the total deposit or a partial forfeiture. A release agreement should provide that all further rights and obligations are null and void. California Association of REALTORS® form CC-11 Cancellation of Contract, Release of Deposit and Joint Escrow Inst. can be used as a joint release.

Because brokers may have commission rights, they should be parties to release agreements.

Seller financing disclosure statement When the seller provides carryback financing on one to four residential units, Section 2956 of the Civil Code requires that a disclosure statement be provided to both buyer and seller. While technically not a contract, it is ordinarily an attachment or an addendum to a purchase agreement. California Association of REALTORS® Seller Financing Addendum and Disclosure (SFA-11) complies with the statutory disclosure requirements.

Estimated buyer’s costs The estimated buyer’s costs sheet is similar to a seller’s net form and is not a contract. It is a disclosure form to show a buyer the funds needed to complete a transaction. The form can be used for purchase agreements, counteroffers, exchange agreements, or even option agreements. California Association of REALTORS® Estimated Buyer’s Costs (EBC-11) form provides for the purchaser’s signature. The agent

is therefore protected against later allegations that the buyer was misled about the cash requirements for purchasing the property.

Note: A number of companies provide forms similar in purpose to CAR forms referenced.

Mortgage loan disclosure statement Before a borrower is obligated to complete a non-federally related loan agreement arranged by a real estate broker, the borrower must be given and must sign a mortgage loan disclosure statement setting forth all costs and fees, payments, liens, et cetera. The disclosure must be made on a form approved by the Department of Real Estate, and the mortgage broker must keep a copy of the disclosure form for three years. The first Tuesday Mortgage Loan Disclosure Statement is an approved form for this purpose.

LEASES

Listing forms to lease or rent, such as the Residential Rental Agreement Month-to-Month form by Realty Publications, Inc. (Figure 6.4), are quite similar to sale listing agreements. When a landlord accepts a deposit on a rental from a prospective tenant, the landlord could be entering a lease agreement unless it is clear it is only an *application* to rent and not an *agreement* to rent. Most standard forms make it very clear that it is an application to rent only and must be approved by the owner.

Many types of leases and lease forms are available. Figure 6.4 provides a simple residential lease form. Agents should seek legal advice for any major modification of a simple lease form. For commercial and industrial leases, using preprinted forms is dangerous because the forms probably will not accurately reflect the needs and intent of the parties.

The cut-and-paste leases that are frequently prepared by agents from other leases could subject an agent to a charge of the unauthorized practice of law, as well as liability for errors or omissions. An agent who assumes the responsibility of preparing a lease has the duty to do so properly.


BROKER-SALESPERSON AGREEMENT

Brokers are required to have a written contract with their salespeople. The broker-salesperson relationship is covered in detail in Unit 3.

RETENTION OF RECORDS

A real estate broker must retain, for three years, copies of all listings, deposits, receipts, canceled checks, trust records, and other documents executed by the broker or obtained in connection with any transaction for which a real estate license is required. The retention period runs from the date of closing a transaction or, if not closed, from the date of the listing. The DRE has taken the position that texts, emails, tweets and the like created and sent or received by a licensee during the negotiations for the sale or purchase of property must be maintained as part of the transaction file.

FIGURE 6.4: Residential Lease or Month-to-Month Rental Agreement

	RESIDENTIAL RENTAL AGREEMENT Month-to-Month
Prepared by: Agent _____ Broker _____	
Phone _____ Email _____	

NOTE: This form is used by a leasing agent, property manager or landlord when renting a residential property on a month-to-month basis, to grant the tenancy and set the rent to be paid, identify who will pay which utilities, and allocate maintenance responsibilities between the landlord and tenant.

DATE: _____, 20____, at _____, California.
Items left blank or unchecked are not applicable.

FACTS:

1. This rental agreement is entered into by _____, as the Landlord, and _____, as the Tenant(s),

1.1 regarding residential real estate referred to as _____,

1.2 including the following:

☐ Garage/parking space # _____
☐ Storage space # _____
☐ Furnishings _____

1.3 The following checked attachments are part of this agreement:

<input type="checkbox"/> Rent control disclosures <input type="checkbox"/> House/Building rules <input type="checkbox"/> Condition/Inventory of Furnishings Addendum [See RPI Form 561] <input type="checkbox"/> Lead-Based Paint Disclosure [See RPI Form 557] <input type="checkbox"/> Brokerage Fee Addendum [See RPI Form 273] <input type="checkbox"/> _____	<input type="checkbox"/> Credit Application [See RPI Form 553] <input type="checkbox"/> Condition of Premises Addendum [See RPI Form 560]
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------

AGREEMENT:

2. DEPOSIT:

2.1 Landlord acknowledges receipt of \$_____ as a security deposit.

2.2 The deposit is security for the diligent performance of Tenant's obligations, including payment of rent, repair of damages, reasonable repair and cleaning of premises on termination, and any loss, damages or excess wear and tear on furnishings provided to Tenant.

2.3 No interest will be paid on the deposit and Landlord may place the deposit with their own funds, except where controlled by law.

2.4 Within 21 days after Tenant vacates, Landlord to furnish Tenant with a security deposit statement itemizing any deductions, with a refund of the remaining amount.

3. TERM OF RENTAL AGREEMENT:

3.1 This rental will begin on _____, 20____, and continue on a month-to-month basis.

3.2 Tenant may terminate this agreement on 30 days' written notice. Landlord may terminate this agreement on 30 days' written notice if Tenant occupied the property for less than one year, or 60 days' written notice if Tenant occupied the property for one year or more. [See **RPI** Forms 569-1, 571, and 572]

4. RENT:

4.1 Tenant to pay, in advance, \$_____ rent monthly, on the _____ day of each month.

4.2 Rent to be paid by:

a. ☐ cash, ☐ check, or ☐ cashier's check, made payable to Landlord or their agent and delivered to:

(Name) _____

(Address) _____

(Phone/Email) _____

b. ☐ credit card # _____ / _____ / _____ / _____ issued by _____, which Landlord is authorized to charge each month for rent due.

FIGURE 6.4: Residential Lease or Month-to-Month Rental Agreement (continued)

----- PAGE 2 OF 4 — FORM 551 -----

c. ☐ deposit into account number _____ at
 (Financial Institution) _____
 (Address) _____

d. ☐ _____.

4.3 Tenant to pay a charge of ☐ \$ _____, or ☐ _____% of the delinquent rent payment, as an additional amount of rent, due on demand, in the event rent is not received within ☐ five days, or ☐ _____, after the due date.

4.4 If any rent or other amount due Landlord is not received within five days after its due date, interest will thereafter accrue on the amount at 18% per annum until paid. On receipt of any past due amount, Landlord to promptly make a written demand for payment of the accrued interest which will be payable within 30 days of the demand.

4.5 Tenant to pay a charge of \$ _____ as an additional amount of rent, due on demand, for each rent check returned for insufficient funds or stop payment, in which event Tenant to pay rent when due for each of the three following months by cash or cashier's check.

5. POSSESSION:

5.1 Tenant will not be liable for any rent until the date possession is delivered.

5.2 If Landlord is unable to deliver possession, Landlord will not be liable for any damage, nor will this agreement terminate.

5.3 Tenant may terminate this agreement if Landlord fails to deliver possession within five days of commencement.

5.4 Only the above-named Tenant(s) are to occupy the premises along with the following individuals: _____

5.5 Tenant will not assign this agreement or sublet, or have boarders or lodgers.

5.6 Tenant(s) will have no more than _____ guests staying the greater of no more than 10 consecutive days or 20 days in a year.

5.7 Tenant agrees the premises, fixtures, appliances, furnishings and smoke and carbon monoxide detectors are in satisfactory and sanitary condition, except as noted in an addendum. [See **RPI** Form 561]

5.8 Landlord to make any necessary repairs as soon as possible after notification by Tenant. If Landlord does not timely make necessary repairs, Tenant may have the repairs made and deduct the cost, not to exceed one month's rent.

6. TENANT AGREES:

6.1 To comply with all building rules and regulations and later amendments or modifications.

6.2 To pay for the following utilities and services: _____

a. Landlord to provide and pay for: _____.

6.3 To keep the premises clean, well ventilated, free of mold contaminating moisture buildup and sanitary.

a. Tenant to promptly notify Landlord of unabated moisture buildup in the premises for prevention of mold contamination.

b. Tenant to properly dispose of all garbage and waste.

6.4 To routinely check and properly maintain smoke and carbon monoxide detectors.

6.5 To properly operate all electrical, gas and plumbing fixtures and pipes, and keep them clean and sanitary.

6.6 ☐ Yard maintenance included in Tenant obligations.

6.7 To make the premises available on 24 hours' notice for entry by Landlord to make necessary repairs, alterations or services, or to exhibit the premises to prospective purchasers, tenants, employees or contractors.

a. In case of emergency or Tenant's abandonment of premises, Landlord may enter the premises at any time.

6.8 Not to disturb, annoy, endanger or interfere with other occupants of the building or neighboring buildings.

6.9 Not to use the premises for any unlawful purpose, violate any government ordinance, or create a nuisance.

6.10 Not to destroy, damage or remove any part of the premises, equipment or fixtures or commit waste, or permit any person to do so.

6.11 Not to keep pets or a waterbed on the premises without Landlord's written consent.

a. See attached ☐ Pet Addendum [See **RPI** Form 563], ☐ Waterbed Addendum. [See **RPI** Form 564]

6.12 Not to make any repairs, alterations or additions to the premises without Landlord's written consent.

a. Any repairs or alterations become part of the premises.

6.13 Not to change or add a lock without written consent.

6.14 Smoking is prohibited in the following area(s) _____

----- PAGE 2 OF 4 — FORM 551 -----

FIGURE 6.4: Residential Lease or Month-to-Month Rental Agreement (continued)

----- PAGE 4 OF 4 — FORM 551 -----

<p>I agree to let on the terms stated above.</p> <p>Date: _____, 20____</p> <p>Landlord: _____</p> <p>Signature: _____</p> <p>Landlord's Broker: _____</p> <p>Broker's DRE #: _____</p> <p>is the broker for: <input type="checkbox"/> Landlord <input type="checkbox"/> both Tenant and Landlord (dual agent)</p> <p>Landlord's Agent: _____</p> <p>Agent's DRE #: _____</p> <p>is <input type="checkbox"/> Landlord's agent (salesperson or broker-associate) <input type="checkbox"/> both Tenant's and Landlord's agent (dual agent)</p> <p>Signature: _____</p> <p>Address: _____</p> <p>Phone: _____ Cell: _____</p> <p>Email: _____</p>	<p>I agree to occupy on the terms stated above.</p> <p>Date: _____, 20____</p> <p>Tenant: _____</p> <p>Signature: _____</p> <p>Tenant: _____</p> <p>Signature: _____</p> <p>Tenant's Broker: _____</p> <p>Broker's DRE #: _____</p> <p>is the broker for: <input type="checkbox"/> Tenant <input type="checkbox"/> both Tenant and Landlord (dual agent)</p> <p>Tenant's Agent: _____</p> <p>Agent's DRE #: _____</p> <p>is <input type="checkbox"/> Tenant's agent (salesperson or broker-associate) <input type="checkbox"/> both Tenant's and Landlord's agent (dual agent)</p> <p>Signature: _____</p> <p>Address: _____</p> <p>Phone: _____ Cell: _____</p> <p>Email: _____</p>
<div style="display: flex; justify-content: space-between; border-top: 1px solid black;"> FORM 551 02-20 ©2020 RPI — Realty Publications, Inc., P.O. BOX 5707, RIVERSIDE, CA 92517 </div>	

DISCLOSURES

Unit 3 covers disclosures required in real estate transactions.

Many of the required disclosures are set forth in standard real estate forms, however the failure of a form to include a required disclosure does not excuse a broker from liability. Further information is available in the pamphlet *Disclosures in Real Property Transactions*, published by the Department of Real Estate. This information can also be accessed through its website, www.dre.ca.gov.

WEB LINK



Note: Disclosure Forms, other forms, and sample forms are available by contacting the California Association of REALTORS®, at www.car.org. Other sample forms are also available from RPI (Realty Publications, Inc.) at <http://journal.firsttuesday.us/forms-download-2>.

SUMMARY

The real estate agency agreement is known as the “listing.” The types of listings are as follows:

- **Exclusive right-to-sell listing:** This listing provides that the broker is entitled to a commission if the listing broker or any other broker or the owner sells the property.
- **Exclusive agency listing:** This listing makes the broker the owners’ exclusive agent. The broker is entitled to a commission if the listing broker or any other broker sells the property, but the owners can sell the property themselves without being obligated to pay a commission.
- **Open listing:** This is a nonexclusive listing whereby brokers are entitled to a commission only if they are successful.
- **Oral listing:** Generally, a verbal real estate listing is unenforceable because of the statute of frauds. The owners might waive statute of frauds protection if they encourage a broker to continue to work on a listing after it has expired.
- **Buyer listing:** Such listings can be of various types, but the agency is with the buyer.
- **Net listing:** A net listing can be any of the preceding listing types. *Net* refers to the broker’s commission, which is all monies over a net price for the owner.

In open listings and exclusive agency listings, procuring cause is often an issue. The agent may not be entitled to a commission if the agent failed to initiate an uninterrupted series of events that led to the sale.

Besides listing contracts, other agreements that have relevance between the principal and the agent include the following:

- **Advance fee addendum to listing:** This agreement sets forth activities for which the agent is to be compensated, as well as the fee to be paid in advance.
- **Advance costs addendum:** This addendum covers costs to be advanced to cover expected broker outlays.
- **Listing modification:** This agreement allows changes to the listing without an entire new agreement.
- **Loan broker listing agreement:** This listing gives the loan broker the right to obtain a loan for a prospective borrower.
- **Seller’s net:** This is a statement from the agent that shows what the owner will have after all costs, payments, and expenses.

Options are contracts to make contracts whereby optionees have an irrevocable right to make a contract if they wish to do so.

A finder’s fee agreement sets forth the conduct of the finder and the compensation. It protects both the broker and the finder.

While agreements between brokers to split commissions need not be in writing, cooperating broker agreements prevent misunderstandings.

Estimated buyer's costs: By using this disclosure form, the broker is protected against later allegations that the buyer was misled regarding financial requirements for purchase.

The real estate purchase contract generally is the buyer's offer to purchase. When accepted by the seller, it becomes a binding contract. Additional forms of interest include the following:

- Contingency removal: When signed by the buyer, this simple form will remove contingencies from the offer.
- Interim occupancy agreement: This agreement allows the purchaser early possession of the premises as a tenant, not as a buyer.
- Counteroffer: Rather than modify an offer, a party can counter an offer with a separate counteroffer form. The advantage of a counteroffer form is that it helps to reconstruct the events clearly.
- Seller financing disclosure statement: This statement, which is provided to both buyer and seller, warns parties of the effect of terms and provides a full disclosure.
- Release of contract : By signing a release agreement, the parties can agree to cancel an agreement.
- Mortgage loan disclosure statement: This form is required when the broker is arranging credit while acting as a mortgage loan broker.
- Exclusive authorization to lease or rent: This is the listing agreement for rentals.
- Residential lease: Agents should not attempt major modifications of lease forms because of their liability for errors and omissions, as well as because it could be the unauthorized practice of law. The use of preprinted forms for other than simple residential leases is dangerous because they are unlikely to reflect the intent of the parties.
- Broker-salesperson contracts: Usually contracts specify independent contractor status.
- A great many disclosures are required by state and federal law. While many disclosures are included in standard forms, the failure of forms to include required disclosures does not excuse a broker from liability.

DISCUSSION CASES

1. An exclusive listing entered into on August 4, 1966, was revoked by the owners on November 25, 1966, before its expiration. It was alleged that the broker failed to advertise, show the property, and present offers. **If the allegations were correct, was the cancellation of the irrevocable exclusive listing proper?**

Coleman v. Mora (1968) 263 C.A.2d 137

2. While a listing was in force, the broker sent a letter to the owner saying that she had obtained a \$500 deposit on the purchase price of the property. She did not reveal the name of the buyer or submit the written offer. The owner never received the offer because he was taken to the hospital and died.

The broker claimed she was entitled to her commission because she had produced a purchaser who was ready, willing, and able to buy on the listing terms. **Was she right?**

Duin v. Security First National Bank (1955) 132 C.A.2d 904

3. In February 1955, Hunter authorized Rose, a licensed broker, to sell a motel for \$197,500 (open listing). Spratt, a salesman for Rose, showed the property to Schmidt. In April 1955, Spratt sent a letter to Hunter stating, "This letter is being sent to you to put you on notice that this office was the procuring agent and that all brokerage rights are being claimed and in the event of a sale to Mr. Schmidt, a 5% brokerage commission of the sales price will be due Robert Rose Realty Company."

There was no reply to this letter, but on May 5, Hunter notified Rose that the motel was "off the market." On May 31, Hunter sent a letter to Rose saying he could show the property again. A postscript stated, "No Trades Accepted."

In the meantime, Schmidt had continued to negotiate with Hunter and purchased the motel for \$165,000 and traded personal property valued at \$30,000.

Evidence was introduced to show that another agent first called Schmidt's attention to the motel in September 1954. **Is Rose entitled to a commission?**

Rose v. Hunter (1957) 155 C.A.2d 319

4. **Is an oral agreement of a broker to pay a finder's fee enforceable?**

Grant v. Marinell (1980) 112 C.A.3d 617

5. A broker sued the seller for a commission. The seller's defense was the lack of a written listing. In this case, the seller's attorney had advised the broker that a listing had been prepared and adopted by the seller's board of directors. **Is the broker entitled to a commission?**

Owens v. Foundation for Ocean Research (1980) 107 C.A.3d 179

6. A broker found a buyer under an oral listing. The deposit receipt signed by the parties provided a commission of \$8,250, or one-half of the forfeited deposit.

The escrow instructions differed from the deposit receipt and provided, "Pay at close of escrow any encumbrances necessary to place this title in the condition called for and the following: Pay commission of \$8,250 to Ruth Lipton Realty Company..."

The sale was never completed. The defendant claimed the close of escrow was a condition precedent to payment of the commission. **Was the broker entitled to a commission?**

Lipton v. Johansen (1951) 105 C.A.2d 363

7. A 20-day exclusive listing provided for \$5,000 down. Within the 20 days, the agent brought the owner \$1,000 as a deposit. The offer provided for \$5,000 in cash 20 days after execution of a contract to purchase.

The owner refused to accept the \$1,000 check offered, claiming he was entitled to \$5,000, which he demanded in gold. The purchaser then said, "Give me time to step out to the bank, and I'll get the money for you." The seller replied, "You need not, because I don't want to sell the property on those terms anyway." **Is the agent entitled to a commission?**

Merzoian v. Papazian (1921) 53 C.A. 112

8. Under an exclusive right-to-sell listing, a broker advertised a country club property and contacted members of the club about the property, which was located on a fairway. No offers were received.

The defendant's fiancé and the broker argued before the expiration of the listing. The defendant's fiancé told the broker to remove his sign because his services were no longer wanted. The broker asked the defendant if she concurred, and she said that she did.

Upon request from the broker's attorney for commission, the defendant softened her position and requested that the broker continue to work on the property.

The listing provided that the broker was entitled to his commission if the owner withdrew the property from the market. **Is the broker entitled to his commission?**

Blank v. Borden (1974) 11 C.A.3d 963

9. The plaintiff's help was requested to obtain financing for a shopping center. The plaintiff asked for a 3% fee, which was agreed on, and then contacted various lenders.

The plaintiff located a lender and brought the parties together, but talks broke off. Some months later, after being unable to find financing, the defendant contacted the same lender, and a loan commitment was made for \$7 million. The plaintiff was not notified.

The defendant claimed that the plaintiff was not a licensed real estate broker, so no fee need be paid. **Do you agree?**

Tyrone v. Kelly (1973) 9 C.A.3d 1

10. A broker had a listing on eight buildings with a commission of \$1,000 on each. The broker agreed that no commission would be due if there was no sale. Because of a cloud on the title, escrow could not close. The broker orally agreed to reduce the commission by 50% (to \$4,000) if the sellers would clear the title. Pursuant to this agreement, the title was cleared, and the broker aided in closing escrow. After receiving a \$4,000 check, which the broker cashed, he changed his position and demanded the balance of his commission according to the listing. **Was the broker entitled to additional compensation?**

Fidler v. Schiller (1963) 212 C.A.2d 569

11. The broker made fraudulent representations about a well. He stated that it could provide sufficient water for a parcel and that it produced at least 60 miner's inches. The escrow instructions stated, "Buyer has inspected well and accepts same 'as is.'" **Are the broker and/or vendor liable because of the insufficiency of the well?**

Crawford v. Nastos (1960) 182 C.A.2d 659

12. A sale was to be subject to testing the water availability. If the test was not satisfactory to the buyers, the deposit was to be returned to them. The buyer was not satisfied and asked for and was given the deposit without the concurrence of the owner. The seller then sued the broker for wrongfully returning the deposit. **Should the broker have returned the buyer's deposit?**

Lyon v. Giannoni (1959) 168 C.A.2d 336

13. A builder contacted a subdivider to purchase a lot for a client. The subdivider, as a condition of sale, required that the subdivider's broker be paid a commission if the lot was resold within three years. This provision was insisted on even though the builder already had a buyer. After the builder conveyed title to the buyer, he refused to pay the commission. **Was the refusal proper?**

Classen v. Weller (1983) 145 C.A.3d 27

14. A seller agreed to pay a broker's commission out of the payments as received. The seller foreclosed on the property but then reconveyed the property to the original buyer on different terms. The broker actively participated in the second sale, but no new listing was entered into. **Is the broker entitled to further commission payments?**

Hughes v. Morrison (1984) 160 C.A.3d 103

15. The owner of a home had a contract with a builder. The builder would take the home in trade at \$113,000 for a new home under construction if the owner was unable to sell it. The house was listed for sale, and an offer was received for \$115,000. Because this was less than the \$113,000 credit the builder had offered (after commissions), the owner turned down the offer. After the listing expired, the offeror was contacted, and the property was transferred to the builder and then immediately to the original offeror by the builder. The listing contained a safety clause requiring a commission if the property was sold during a stated time period to anyone who had made an offer during the listing. **Does this safety clause apply when the sale was made by the builder and not the owner who had listed the property?**

McKay and Company v. Garland (1986) 701 S.W.2d 392

16. Chan was a buyer's broker for Tsang. Chan located a shopping center, and Tsang agreed to pay \$4 million. The purchase contract provided that if the buyer defaulted, the seller would retain the \$20,000 deposit as liquidated damages. Tsang defaulted on the purchase agreement, and Chan sued Tsang for the commission he would have received had the sale been completed. **Does Chan have a valid claim?**

Chan v. Tsang (1991) 1 C.A.4th 1578

UNIT QUIZ

1. Which phrase *BEST* describes an owner's oral agreement to pay a real estate sales commission?
 - a. Enforceable if the seller benefited by the broker's efforts
 - b. Enforceable for commercial property only
 - c. Unenforceable
 - d. Enforceable only for sales up to \$1,000
2. A broker brought an offer to an owner. While the broker did not have a listing, the offer provided for a commission. The owner crossed out the provision for a commission above the signature block and signed the acceptance. Which is *TRUE* regarding the broker's rights?
 - a. By signing the acceptance, the owner made the broker his agent.
 - b. The broker is entitled to a reasonable commission.
 - c. The broker is entitled to a full commission if the sale is completed.
 - d. There was no listing, so no commission need be paid.
3. A valid listing agreement must contain which stipulation?
 - a. The preprinted rate of commission
 - b. A hold-harmless clause
 - c. Specific reference to the subject matter of the listing
 - d. The right of either party to cancel upon notice
4. The effect of a hold-harmless clause is that it
 - a. warrants that the property presents no risks.
 - b. indicates the property is to be sold "as is."
 - c. means the owner agrees to indemnify the agent for losses suffered because of the owner's failure to disclose or the owner's incorrect disclosure.
 - d. does none of these.
5. An exclusive right-to-sell listing provides for 20% down and owner financing at 13% interest. The owner received a full-price cash offer that he does not wish to accept. Which is *TRUE* regarding the owner's rights?
 - a. He must pay the commission but can reject the offer.
 - b. He must accept the offer and pay the commission.
 - c. He may reject the offer without obligation regarding commission.
 - d. He may accept the offer without obligation regarding commission.

6. After signing an exclusive right-to-sell listing, an owner refuses to accept an offer that conforms exactly to the terms of the listing. In this case, specific performance can be obtained by
 - a. the broker.
 - b. the offeror.
 - c. either of these.
 - d. neither of these.
7. The rate of commission for the sale of real property is set by
 - a. the real estate law.
 - b. local real estate boards.
 - c. the real estate commissioner.
 - d. agreement between the parties.
8. A commission is ordinarily earned by a broker when
 - a. escrow closes.
 - b. the broker procures a ready, willing, and able buyer.
 - c. escrow opens.
 - d. the purchaser deposits the full purchase money or liens in escrow.
9. A broker's promise to use diligence makes a listing
 - a. a bilateral contract.
 - b. an illusory contract.
 - c. a unilateral contract.
 - d. voidable.
10. On an exclusive listing of a single-family home, a broker can be disciplined for failure to
 - a. include a definite termination date.
 - b. indicate that the commission is negotiable.
 - c. give a copy to the owner.
 - d. any of these.
11. The exclusive listing that broker Jones had on the Adams farm expired at noon on December 15. At 1 pm on December 15, Adams gave broker Riley an exclusive listing on the farm. At 2:30 pm on December 15, broker Jones procured a buyer at the price and terms of the listing. Who is legally entitled to the commission?
 - a. Broker Jones, because a buyer was procured within a reasonable period of time of the listing
 - b. Broker Riley
 - c. Brokers Riley and Jones, who must split the commission equally
 - d. Neither broker is legally entitled to the commission

12. Which provision would *LEAST* likely be found in a real estate purchase contract?
 - a. Safety clause
 - b. Occupancy intentions
 - c. Financing contingency
 - d. Provision for physical inspection
13. A termination date is required for all contracts below *EXCEPT*
 - a. an open listing.
 - b. an exclusive agency listing.
 - c. an exclusive right-to-sell listing.
 - d. an option.
14. To be the procuring cause of a sale, the broker must have
 - a. made the sale.
 - b. supplied the owner with the name of the purchaser.
 - c. initiated an uninterrupted chain of events that led to the sale.
 - d. made first contact with the buyer.
15. Procuring cause is of greatest significance in
 - a. options.
 - b. oral listings.
 - c. open listings.
 - d. rights of first refusal.
16. To collect a commission for a sale on an exclusive right-to-sell listing, the broker must prove all of the following *EXCEPT*
 - a. that there was a valid listing.
 - b. that the sale took place during the listing, an extension of it, or its safety period.
 - c. that the broker was licensed at the time the commission was earned.
 - d. that the broker was the procuring cause of the sale.
17. When a listing includes a purchase right and the broker informs the owner that the broker will buy the property, the broker must
 - a. disclose all known facts to the seller.
 - b. present any offers received.
 - c. obtain the seller's written consent to exercise the option.
 - d. do all of these.

18. An oral agreement *MOST* likely to be enforceable would be
 - a. an option to purchase.
 - b. an agreement between brokers to split a commission.
 - c. an open listing.
 - d. a real estate purchase contract.
19. A listing broker refuses to split a commission with a cooperating broker after agreeing orally to do so. To collect, the cooperating broker would likely
 - a. notify the real estate commissioner.
 - b. file a complaint with the state labor commissioner.
 - c. start legal action against the other broker.
 - d. do nothing, because an oral agreement cannot be enforced.
20. Liquidated damages can exceed 3% of the sales price when the subject property is
 - a. five residential units.
 - b. residential property that the buyer did not intend to occupy.
 - c. a commercial building.
 - d. any of these.
21. An offer to purchase stated that it would remain open for 48 hours. Which statement is *TRUE* regarding this offer?
 - a. This offer is really an option.
 - b. This offer is irrevocable for 48 hours.
 - c. This offer can be revoked by the offeror before the expiration of 48 hours without penalty.
 - d. While the offer is revocable immediately, the offeror must forfeit the deposit.
22. A real estate purchase offer fails to specify a time for acceptance. The offer
 - a. must be accepted immediately.
 - b. can be accepted within a reasonable period of time.
 - c. cannot be withdrawn before acceptance.
 - d. is void.
23. Which statement is *TRUE* about contingencies in purchase offers?
 - a. They must be reasonable to be enforceable.
 - b. The person benefiting by the contingency can waive it.
 - c. They make the contract illusory.
 - d. If one party can be relieved by the failure of a contingency, the other party can also be relieved from performance should the contingency fail.

24. A contract for the sale of a residence stated “as is.” Which statement is *TRUE* relating to this provision?
- a. It is void because a buyer has a right to a habitable dwelling.
 - b. It applies to visible conditions only.
 - c. It applies only to matters of title.
 - d. It is a valid disclaimer as to all defects.
25. “As is” would *MOST* likely protect a seller from hidden defects when the sale is
- a. to a buyer who does not intend to occupy the premises.
 - b. of a commercial property.
 - c. a single-family residence only.
 - d. of one to four residential units.

7

UNIT SEVEN



PROPERTY, ESTATES, AND RECORDING

KEY TERMS

acknowledgment	contingent remainder	pur autre vie
actual notice	defeasible estate	real property
after-acquired title	emblements	remainder interest
appurtenance	fee simple	restraint against alienation
bundle of rights	fixtures	reversionary interest
chattels	freehold estates	rule against perpetuities
chattels real	fructus industriales	successive estates
chose in action	fructus naturales	trade fixtures
concurrent estates	life estates	vested remainder interest
condition precedent	lis pendens	waste
condition subsequent	nonfreehold estates	wild document
constructive notice	patents	

ORIGIN OF CALIFORNIA LAND OWNERSHIP

In 1513, Balboa crossed the Isthmus of Panama and claimed for Spain all of the land washed by the waters of the Pacific Ocean. In 1542, Cabrillo sailed up the Pacific coast and landed in California, again claiming ownership for Spain. Under Spanish domination, title to California land was held in the name of the crown. Some grants of land were made, but they were primarily grants of use (agriculture and grazing) and not of title.

A number of presidios, or military garrisons, were established, as were several pueblos, or towns. The pueblos received four square leagues of land (about 4,400 acres) and had the power to grant city lots.

The mission period started in 1769 with the establishment of a string of missions along the California coast. Most of the padres returned to Spain after Mexican independence (1822) and the subsequent secularization of the missions.

Under the short period of Mexican control (1822–1848), huge tracts of land, known as ranchos, were granted. As mentioned in Unit 1, the Treaty of Guadalupe Hidalgo, which ended the Mexican War (1848), provided that the U.S. government would recognize the property rights of Mexican owners, including community property rights.

Most of California was not privately owned. The United States took title to all lands not given by Spanish or Mexican grants that were not cities, towns, or tidelands. Tidelands, between high and low tide lines, belong to the state.

The United States gave tracts of land to private owners under various homestead, timber, and mining acts. The Preemption Act gave a preferential right to occupants of land to purchase it at a low price. Special congressional grants gave land to the State of California. Additional tracts of land were given to Native Americans by treaty. Railroads received sections of land in a checkerboard pattern along their rights-of-way as an inducement to build. Land also has been given to colleges by the federal government, and, from time to time, land was sold or traded by government agencies. Grants of land from the government were known as **patents**. Today, approximately 50% of California land is owned by private citizens or corporations; the balance is owned by federal, state, and local governments.

PROPERTY

Property is anything capable of being owned. The two major categories of property are real property and personal property.

Real Property

Real property generally consists of

- land;
- what is affixed to land;
- what is incidental, or an **appurtenance**, to land (appurtenances include rights, privileges, and improvements that transfer with the land); and
- what is immovable by law except that, for the purposes of sale, emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale are treated as goods (personal property).

Structures such as buildings, sheds, and fences are affixed to the land and are real property. Examples of incidental rights considered to be real property are riparian rights (the beneficial use of a stream or river by an adjacent landowner, covered in Unit 12) and the right to

lateral support (your neighbor cannot perform any activity, such as excavation that would cause your land to settle or collapse).

Fructus naturales (naturally growing uncultivated trees and crops) are considered real property until severed or constructively severed (sold).

Air rights and mineral, oil, and gas (subsurface) rights generally are considered real property. Easement rights, which are covered in Unit 12, also are considered real property. These rights, unless specifically excluded, transfer with the real estate.

CASE STUDY In the case of *U.S. v. Causby* (1946) 328 U.S. 256, the Supreme Court held that a landowner owns at least as much space above the ground as the owner can occupy or use in conjunction with the land even though the owner does not occupy it in a physical sense. Therefore, low-flying aircraft that interfere with the normal use of property would be interfering with the owner's rights.

Personal Property

Personal property, also known as **chattels**, is any property that is not real property. Personal property is generally considered to be movable. Title to personal property does not automatically pass with the transfer of title to the real property where it is located.

Chattels real **Chattels real** are personal property interests that concern real property. Examples of chattels real are leasehold interests, mortgages, trust deeds, shares in real estate syndicates, and shares in housing cooperatives. While real property oriented, they are considered personal property.

Chose in action **Chose in action** refers to a right to demand money or other personal property through legal action. The claim is considered personal property.

Fructus industriales Also known as **emblems**, **fructus industriales** are crops resulting from labor. While generally regarded as personal property, in the absence of any agreement between the buyer and the seller of real property, they transfer with the land.

If the crops are the fruit of the labor of a tenant, they remain the goods or personal property of the tenant, even though the lease may expire before harvest. The former tenant has the right to return to the land to harvest the crops.

Mineral, oil, and gas rights As previously stated, mineral, oil, and gas rights are real property. An oil lease for an indefinite period is also real property. However, an oil lease for a definite period is personal property.

Because oil and gas are considered fluid, no ownership of the actual oil or gas exists until it is extracted from the ground. Ownership of subsurface rights is actually the right to extract the minerals, oil, or gas. After it has been captured, or removed from the ground, it becomes personal property. The owner of rights actually can take fluid oil and gas from under land for which they have no rights. The owner of rights, however, cannot intrude

on or under land where they have no rights to do so; for example, they cannot slant-drill into the land of another.

An owner can sell mineral and oil and gas rights but retain a royalty interest, as well as land ownership.

CASE STUDY In the case of *Geothermal Kinetics Inc. v. Union Oil Co.* (1977) 77 C.A.3d 56, the court held that where the specific intent of the parties cannot be ascertained, a grant of a mineral estate includes all geothermal resources located on or under the property. It held that a general grant of a mineral estate is intended to convey commercially valuable underground resources that are not necessary for the enjoyment of the surface estate.

Fixtures Fixtures are former items of personal property that have become affixed to realty so that they are now part of the real property. For example, a household furnace is personal property before it is installed in a residence, but it becomes real property (a fixture) after it is installed. Title to fixtures generally transfers with the real property.

There are five basic tests for determining whether or not an item is a fixture:

1. *Intent*: This is the most important test. Did the improver intend to make a permanent improvement to the property? If so, it is likely to be a fixture.

CASE STUDY In the case of *Larkin v. Cowert* (1968) 263 C.A.2d 27, the court held that the fact that carpets and drapes in an apartment house could be removed without damage was of no significance. The court held that the intent was that they remain as long as they served their purpose of higher rents and rentability.

2. *Method of attachment*: Is the item attached in a permanent manner? Bolts, nails, concrete, and pipe generally are considered permanent, even though an item can be readily removed. If an item is attached by roots (a tree or a plant), it generally is regarded as a fixture.

A fixture could be attached by its weight alone. An example would be a building that is not anchored to a foundation.

CASE STUDY The case of *Seatrail Terminal of California, Inc. v. County of Alameda* (1978) 83 C.A.3d 69 involved two cargo cranes. The cranes weighed 750 tons each and ran on rails on a wharf. They were not attached to the realty. However, the terminal had been designed for the use of cranes. The court held that even though not attached to the realty, the cranes were fixtures. They were a necessary part of the wharf and were intended to be permanent.

Note: Alameda County sought to have the cranes declared real property so that they would be subject to real property taxes.

Personal property does not become a fixture when it has been wrongfully attached—when it is attached by a person who is not the owner of the real property—and who had no right or permission to make the attachment.

3. *Adaptability*: Was the item specifically adaptable to the use of the real property? For adaptability, the item need not be custom made; it need only relate reasonably to the use.

For example, an argument could be made that an odd-size refrigerator placed in a specially built alcove is a fixture, even though its only connection to the real property is a plug in a wall socket.

CASE STUDY In *Allstate Ins. Co. v. County of Los Angeles* and *Security Pac. Nat'l Bank v. County of Los Angeles* (1984) 161 C.A.3d 877 (consolidated cases), the plaintiffs had elaborate computer systems placed in rooms with elevated floors (to hide the cables). They also had added supplemental air conditioning. The County of Los Angeles took the position that the systems were real property for taxation purposes.

The buildings had not been specifically designed or substantially modified for the computer systems. There was no evidence that the systems were installed with the intention to affix them to the real estate. The court thus held that standardized general-purpose computers placed in general-purpose office buildings are personal property. The minor alterations required did not make the systems real property.

All three of the preceding tests need not be met for the courts to determine that an item is a fixture. Civil Code Section 1019 added two additional tests for fixtures:

4. *Agreement*: Parties are free to agree on whether an item is real or personal property, and their agreement will govern the nature of the property.
5. *Relationship of the parties*: When it is not clear if an item is a fixture or personal property, the issue will be determined in favor of the
 - tenant between landlord and tenant,
 - buyer between seller and buyer, and
 - lender between borrower and lender.

Trade fixtures Trade fixtures are fixtures installed for the purpose of trade or business. They remain the property of the tenant and may be removed at any time before the expiration of the lease. In California, a tenant may remove from the premises anything the tenant has affixed thereto for the purposes of trade, manufacture, ornament, or domestic use if the removal can be effected without substantial injury to the premises, and unless some agreement to the contrary has been made between the landlord and the tenant.

CASE STUDY In the case of *Roberts v. Mills* (1922) 56 C.A. 556, the court held that a building was a trade fixture. The building erected by the tenant was built in such a manner that it could be removed without injury to the premises.

Civil Code Section 1019 restricts tenants' rights to remove trade fixtures if the trade fixture becomes an integral part of the premises.

CASE STUDY In the case of *Yokohama Specie Bank Ltd. v. Higashi* (1943) 56 C.A.2d 709, a tenant installed a refrigeration plant in a building. Installation required removal of columns supporting the building and substitution of refrigerating rooms. The court held that, because the refrigerating rooms had become an integral part of the building, they were not subject to removal by the tenant.

For month-to-month leases, courts generally will allow a reasonable period after the end of the lease for removal of trade fixtures.

A "mistaken improver" is allowed to remove the improvements, even though they would otherwise be regarded as fixtures. The mistaken improver will, however, be liable for damages resulting from the removal.

Mobile Homes

Since July 1, 1980, mobile homes attached to a foundation have been taxable as real property. Besides placing the mobile home on a foundation, in order to have the home considered real property, the owner must

- obtain a building permit,
- obtain a certificate of occupancy, and
- record a document reflecting that the mobile home has been affixed to a foundation.

A mobile home may not be removed from a foundation (real property) unless

- all people who have any interest in the real property consent to its removal, and
- the Department of Housing and Community Development is notified 30 days before removal.

Mobile homes sold new after July 1, 1980, that are not attached to a foundation and mobile homes sold before that date whose vehicle license fees are 120 days or more delinquent are taxed as personal property. While the tax rate and procedure for personal property and real property are virtually indistinguishable, mobile homes attached to permanent foundations have certain advantages over mobile homes that are taxed as personal property. Under Proposition 13, the assessed value for mobile homes taxed as real property can increase only 2% each year. If taxed as personal property, the mobile home would be taxed at full market value.

Mobile homes sold new on or before June 30, 1980, continue to be taxed as vehicles. The vehicle fees are now paid to the Department of Housing and Community Development, not the Department of Motor Vehicles.

DEGREE OF OWNERSHIP

The degree of ownership a person has in property is known as an *estate*.

Estates where the exact termination date is unknown are considered **freehold estates**. Fee simple estates (indefinite period) and life estates (end with death) are the two types of freehold estates and are considered to be real property.

Fee Simple or Fee Simple Absolute

The **fee simple** or fee simple absolute estate is the highest degree of ownership possible. Normal home ownership would be held in fee simple. There are three characteristics of fee simple ownership:

1. There is no time limit.
2. Owners can transfer title freely.
3. The estate may be inherited (an estate of inheritance).

A grant that does not indicate the extent of the interest being conveyed is presumed to be made in fee simple.

The beneficial rights of ownership are called the **bundle of rights**, and they include the right to convey, lease, use, encumber, inherit, and exclude others. Ownership rights are not, however, absolute. Under the police power of the state, land use can be regulated (see Unit 13) and property can be taken, with compensation, for public purposes (see “Eminent Domain,” Unit 9).

Defeasible estates A **defeasible estate** is an estate that can be lost. The fee interest is qualified. For example, with a fee on a **condition subsequent**, property is transferred to a grantee with a condition. If the condition is breached, the estate can revert to the grantor by court action. The grantor must bring action within five years of the breach (Civil Code Section 784). The grantor therefore retains a **reversionary interest**.

Grantors sometimes use grants with a condition subsequent to advance their personal convictions. For example, a common condition subsequent is the prohibition of the sale of alcoholic beverages. The deed could provide that the property, if ever used for the sale of alcoholic beverages, will revert to the grantor or heirs. If a grantor failed to take action within a five-year period after a condition subsequent was breached, the courts could determine that the grantor has waived the right to enforce the reversion.

Property also may be dedicated to a municipality or a charity with instructions for its specific use, the condition being that abandonment of that use will result in reversion of the property to the grantor. Courts generally will interpret the specified use quite liberally to avoid forfeiture.

A **condition precedent** precludes a grant from taking place until something happens, such as the grantee reaches age 21. Once the condition is met, the grantee has a fee simple interest.

CASE STUDY In *Springmeyer v. City of South Lake Tahoe* (1982) 132 C.A.3d 375, the city acquired title with a condition subsequent that provided for automatic reversion to the grantor if “the city failed to build office buildings for municipal government use by a specified date or the buildings no longer were used for government office purposes.”

The city allowed the county to use the buildings, and the grantor demanded reversion under the second condition. The court held that because reversion is such a harsh penalty, if more than one interpretation is possible, it must fall against triggering a reversion. In this case, “government office purposes” was held to include federal, state, county, and local offices, so the property did not revert to the grantor.

CASE STUDY The case of *Alamo School District v. Jones* (1960) 182 C.A.2d 180 involved a deed given to a school district subject to the right of the grantor to buy back the land at the same price should it ever be abandoned by the school district. The court held that this was not a defeasible estate, but rather was simply a contingent option to purchase. This option was held to be personal, so it did not pass to the heirs of the grantor. It was void upon the grantor's death.

Because the law abhors forfeiture, courts often will determine that a condition is only a covenant so that the remedy for breach will be monetary damages rather than forfeiture.

Restraints against alienation A restraint in a transfer that unreasonably restricts future alienation (the ability to grant, sell, devise, lease, or encumber) is unenforceable and void because it is contrary to public policy. An example of such a **restraint against alienation** would be a conveyance on the condition that the grantee not convey to other than “heirs of my body.”

Life Estates

Life estates are given to a grantee for life. Life tenants have exclusive and absolute use of the property for their lifetime, are entitled to the rents and profits from the property, and can even file a homestead declaration on their interest.

A life estate is generally granted to a person for the grantee's own lifetime, although it is possible to grant a life estate for the life of another (**pur autre vie**). When it is based on the life of another, the death of the life tenant does not affect the estate. The heirs of the deceased will have the use of the property as long as that third party is alive. Normally, however, the life estate is based on the life of the life tenant.

When the life tenant dies, the property either reverts to the grantor or the grantor's heirs (a **reversionary interest**) or passes to a designated third party, who is said to have a **remainder interest**. Upon the death of the life tenant, the reversionary or remainder interest holder customarily holds title in fee simple.

If the remainder interest requires that the third party outlive the life tenant, the third-party interest is a **contingent remainder** (contingent on the third party's being alive to receive the remainder interest). If, however, there are no contingencies, the remainder will, upon the death of the life tenant, pass to the remainder holder or the remainder holder's heirs. This type of estate is called a **vested remainder interest** because someday the life tenant must die, ensuring that the remainder holder will receive the property.

Life estates might be granted to give the grantors a charitable tax deduction while they are alive and allow them to keep all the benefits of ownership. They often are used to care for spouses or others during their lifetime and then go to others to fulfill the wishes of the grantor.

Farmers often give their farmland to a child but retain a life estate. Knowing that they will eventually get the farm, the grantee thus is more likely to stay, and the grantor retains control, along with the income, for life.

Life estates also can be subject to a **condition subsequent**, such as a life estate that goes to a remainder interest holder should the life tenant remarry. This type of estate often is used when the grantor feels that a duty to support the life tenant only while the life tenant remains unmarried.

Life estates can be granted to more than one life tenant. The interests of the joint life tenants would be much like a joint tenancy (see Unit 8), with the last survivor having sole possession (*Green v. Brown* (1951) 37 C.2d 391).

A life tenant cannot use the property in any way that would diminish its value. For example, if tearing down structures or clearing out timber would reduce the property's value, the life tenant would be prohibited from these acts. The life tenant may, however, cut timber as necessary for repairs and fuel. The life tenant also may mine the property, but only if it was mined before the life estate.

Life tenants may not commit **waste**; that is, they must maintain the property, pay taxes, and protect the rights of reversionary or remainder interest holders. If a life tenant does commit waste, the court might appoint a receiver.

CASE STUDY In the case of *King v. Hawley* (1952) 113 C.A.2d 534, a testator gave a life estate in all of his property to his sister. The will provided that she could "use all of the proceeds of my estate for her comfort and support, but that whatever may be left shall go" to the remainder interest. The life tenant transferred some of the property to friends without consideration and some with inadequate consideration. The life tenant was held to have fraudulently attempted to defeat the remainder interest.

For an extraordinary expense, such as a sewer hookup, the expense will be borne proportionately by the life tenant and the remainder or reversionary rights holders, based on the life of the improvement and the age of the life tenant. Courts prorate extraordinary costs based on the benefits to be received.

Life tenants can borrow against the property but cannot encumber the property beyond their lifetime without the concurrence of remainder or reversionary interest holders. Lenders might lend on a life tenant's interests alone if the loan is coupled with a policy of life insurance payable to the lender.

Remainder and reversionary interest holders also can assign or encumber their interests; however, neither they nor their assignees or creditors will have any right to use the property or receive rents or profits until the life estate ends.

Unless the life tenant's use is restricted, the life tenant can lease the property, but the death of the life tenant will terminate the lease unless the reversionary or remainder interest holders also sign the lease as lessors and thus obligate their interests. Before signing a long-term lease, a prospective tenant who will be making substantial improvements should have a title search conducted to be certain of the lessor's interests.

Unless restricted, life tenants can sell their interest, but a purchaser will receive no more than the life tenant possessed. Upon the death of the life tenant, the purchaser's interest will cease.

A life tenant has no duty to insure the property. If the life tenant does insure and the property is destroyed, the prevailing view is that the life tenant is entitled to the insurance proceeds. Some courts have held that the insurance was taken out for the joint benefit of the life tenant and the remainder or reversionary interest holder. Remainder or reversionary interest holders who are not specifically named as an insured should obtain insurance to protect their interests.

If a life tenant receives a property with a mortgage or trust deed against it, the principal payments on the mortgage or trust deed will be a charge against the remainder or reversionary holder, but the interest payments will be the responsibility of the life tenant.

CASE STUDY In the case of *Osborne v. Osborne* (1954) 42 C.2d 358, a deed granting a fee simple estate was deposited into escrow with the provision that it not be delivered to the grantee until the death of the grantor. The court held that, if the grantor intended the transaction to be irrevocable, the deed created a remainder interest in fee simple with a life estate reserved in the grantor.

If a property is taken by eminent domain (see Unit 9), which requires the payment of "just compensation" by the government, the life tenant and the remainder interest owners will share the proceeds based on the benefits to which they are entitled.

A deed transferring the interest of the remainder interest holders to a life tenant will merge the two interests into a fee simple estate owned by the former life tenant.

Rule against perpetuities The **rule against perpetuities** states that any noncharitable interest must vest without limitations within the life of the last beneficiary in being at the time of conveyance, plus 21 years. The interest is further restricted in that it must either vest with an owner or terminate within 90 years of its creation. This rule would prohibit a perpetual trust to support the heirs of the grantor.

Nonfreehold Estates

Nonfreehold estates are leasehold interests (personal property). **Freehold estates** (fee simple) and life estates are real property. Nonfreehold estates are tenancies and are covered in detail in Unit 15.

Concurrent Estates

Concurrent estates—more than one ownership or estate at the same time—can exist in a property. For example, a tenant can have a leasehold estate while an owner has a fee simple interest. The fee simple owner would have a reversionary interest of possession at the expiration of the leasehold interest.

Air and mineral interests also can be conveyed, creating separate interests. Property can even be divided horizontally, with the mineral, oil, and gas rights being conveyed in layers.

Successive Estates

Estates can be established to succeed existing estates. An example of **successive estates** is a remainder or a reversionary estate to follow a life estate.

RECORDING OF REAL PROPERTY INTERESTS

Under the Spanish and Mexican governments, California had no system for recording and safeguarding interests in real property. To prove ownership, a person physically had to possess the original grant or deed.

When California became a state in 1850, one of the first acts of the California legislature was to institute a system for recording interests in real property. The system adopted was patterned after that established by the original 13 states. By providing for evidence of title to be collected and made available at central locations, recording statutes protect buyers against secret conveyances and interests and make real property readily and freely transferable.

The basic real property recording laws are found in Civil Code Sections 1169–1220 and Government Code Sections 27201–27383. The recording statutes provide that, after being acknowledged, any instrument or judgment affecting title to, possession of, or rights in real property may be recorded. Real estate listings may not be recorded because the agent has no rights in real property, only rights to compensation.

Prohibitions against recording contained in documents that could otherwise be recorded would be considered contrary to public policy, and the document could be recorded in spite of the attempted prohibition.

Acknowledgment

Before a judgment can be recorded, it must be acknowledged. **Acknowledgment** is made before a notary or other designated official by the person attesting to the document. That person acknowledges that she is the person claimed and is the one who has signed the instrument as her own free act. The maker of an instrument must appear personally before the notary, and the notary has a duty to ascertain identity by personal knowledge or by identification by a third person under oath. A notary can accept driver's licenses and passports as proof of identity. The notary does not verify the facts of the document.

Notary publics who verify the acknowledgment of a deed or a deed of trust must place in the notary's journal the right thumbprint of the person signing the document.

The acknowledgment must include the state and county where acknowledged and the name and capacity of the acknowledging party.

When two or more people are executing a document requiring acknowledgment, each of their signatures must be acknowledged. Without acknowledgment, constructive notice (discussed in the next section) of that person's interest has not been given.

A person who holds an instrument that otherwise could be recorded except for the lack of acknowledgment can bring an action against the other party to prove the instrument and can then record a certified copy of the judgment (Civil Code Section 1203).

Excepted from the requirement that instruments be acknowledged to be recorded or filed are

- judgments authenticated by the clerk of the court;
- notices of mining claims;
- tax certificates of amount due;
- leases from the federal government; and
- documents required to be signed by an attorney, such as a **lis pendens**, which is a notice of a pending lawsuit involving a claim against real property.

Constructive Notice

Recording a document gives the whole world **constructive notice** of an interest in real property. If Al conveyed to Bert and Bert recorded the deed, subsequent grantees of the property from Al would get nothing because they would have had constructive notice that Al no longer owned the property.

If a document is recorded with a defect, such as the absence of acknowledgment, the recording would not give constructive notice until one year after the recording. A defect, such as a document filed in the wrong county or with a name spelled incorrectly, so that

a reasonable search of the records would not reveal the document, does not provide constructive notice.

Possession also gives constructive notice. Assume Art deeded to Ben, who took possession but did not record. If Art later conveyed the same property to Carl, who recorded, title would be with Ben. Carl had constructive notice by Ben's possession of Ben's interest. In failing to check with the party in possession to ascertain the possessor's interests, Carl did not act diligently. If a buyer checks with a party in possession and is not informed of an adverse claim, however, the possession does not provide constructive notice of the interests of the party in possession.

A plaintiff in an action involving real property may file a *lis pendens* with the county recorder to provide subsequent purchasers or encumbrancers with constructive notice of the plaintiff's claim of interest.

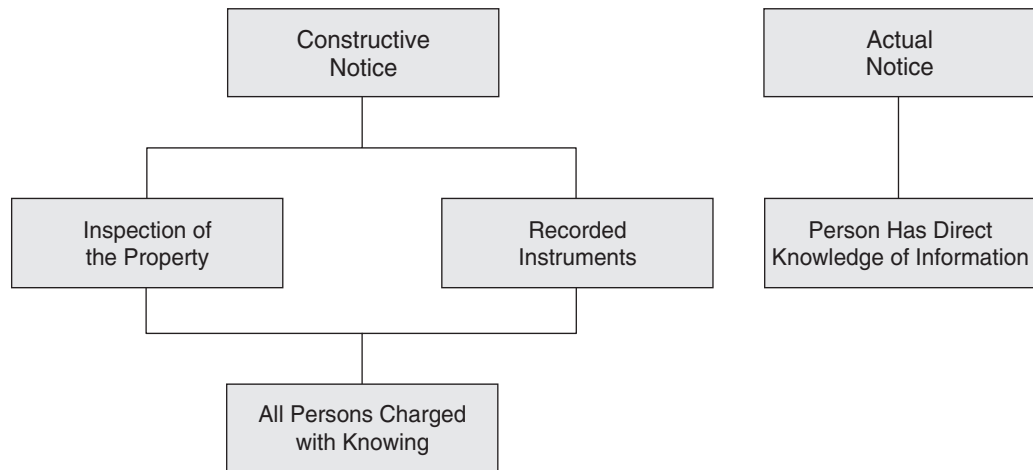
While the law is clear that recording gives constructive notice of the documents recorded, it is not clear whether recording gives constructive notice of all other documents referenced in the recorded document. The prevailing view is that a person should reasonably investigate the referenced document. An improper description of land being conveyed does not give constructive notice as to the land intended to be conveyed.

CASE STUDY *Gates Rubber Co. v. Ulman* (1989) 214 C.A.3d 356 involved a tenant under a 25-year lease who also had a separate option to purchase the property for \$550,000 during the 20th year of the lease. Neither the lease nor the option was recorded, although a short-form lease was recorded that named the parties and referenced the lease. The landlord sold the property six years later for \$633,000. Fourteen years later, in the 20th year of the lease, the tenant sought to exercise the purchase option (the property was now worth \$2 million). The Court of Appeal affirmed the trial court's decision that the defendant (Ulman) should prevail if he qualifies as a bona fide purchaser without notice. While in some instances possession places a duty to inquire, the court held that this is the case only when the possession is inconsistent with record title. In this instance, the tenant's possession was consistent with a recorded lease that made no reference to an option to purchase. While Ulman had a duty to check the lease, there was no duty to inquire as to any other rights the tenant might have. Ulman therefore had taken title free of the option.

Actual Notice

While recording and possession give constructive notice of an interest in real property, **actual notice** is express knowledge of the prior interest. A person who has actual knowledge of a prior interest cannot claim priority of interest because they recorded first. Actual notice has the same effect as the constructive notice of recording.

Figure 7.1 illustrates the difference between actual notice and constructive notice.

FIGURE 7.1: Notice

Priority

Besides providing constructive notice of an interest, recording determines priority of interests. Recording often has been called “the race of the diligent” because priority of interest in the absence of actual knowledge is determined by time and date of recording and not time and date of execution of an instrument (Civil Code Section 1214). (The first to record is first in right.)

Assume that Alvira conveyed to Bryan and Alvira later conveyed the same property to Cindy. If Cindy arrived at the recorder’s office ahead of Bryan, then Cindy’s deed would be recorded first. As a general rule, Cindy would take title and Bryan would have nothing (other than a claim against Alvira). If Cindy *had* diligently searched the records, Cindy would have found no evidence of Bryan’s interest. If anyone should suffer, it should be the one who was negligent in failing to immediately make his interest known as a matter of record rather than a diligent later purchaser, which would mean that Cindy would have good title.

Recording does not give priority over prior unrecorded conveyances if the person recording is not acting in good faith or has not paid a valuable consideration. For example, a recorded deed given without consideration (a gift deed) would not give the grantee priority over a prior unrecorded deed or trust deed that was given for valuable consideration. Therefore, for recording to give priority it must be done by a bona fide purchaser (or lender) for value without prior notice of other interests. The courts would consider the adequacy of consideration in determining whether a party is a bona fide purchaser. A person who receives notice of a prior interest at any time before paying the consideration would not be a bona fide purchaser.

A purchase money trust deed (a trust deed given to finance the purchase) would take priority over liens against the grantee, even though those liens attach as soon as title is passed.

Failure to Record

The recording act does not require recording; it merely permits recording. Between a grantor and a grantee of an unrecorded deed, the grantee would have title. The grantee's title, however, would not take priority over a later recorded deed or trust deed given for value by the original grantor, provided that the later grantee or beneficiary (lender) had no constructive or actual notice of the prior conveyance.

Recording is required for homestead declarations, mechanics' liens, and judgment liens. Without recording, these instruments have no effect.

Documents Recordable Without Owner's Consent

Recording documents in proper form with the owner's notarized signature cannot be prohibited. But the following documents can be recorded without the owner's notarized signature: judgment liens, mining claims against the federal government, tax deeds, trustee's deeds, mechanics' liens, federal and state income tax liens, child support liens, homeowners association liens, and lis pendens.

After-Acquired Title

If a deed is given by a grantor who does not have title, no title would pass to the grantee. However, if the grantor later acquires title, the **after-acquired title** would then pass to the grantee. Similarly, a person who gave a deed of trust on property without owning it would find this lien against the property upon later acquiring title. This principle is called the *doctrine of after-acquired title*. But because a reasonable title search by a later lender would not reveal a lien placed before ownership, the earlier lien would not take priority over a purchase money lien.

Wild and Forged Documents

A **wild document**, one outside the chain of title, gives no constructive notice because it would not be discovered by a diligent search of the records.

A recorded assignment or sublease of an unrecorded lease also would be outside the chain of title and therefore would not give constructive notice.

A forged document is void and does not give constructive notice of any interest and has no effect. Knowingly recording a forged or false document is a felony (Penal Code Section 115). Such an action would also be a tort (slander of title).

There have been incidents in which unscrupulous individuals have forged deeds to themselves, using both forged owner signatures and forged notary seals. They have then borrowed on the property. Because a forged document does not transfer any interest, the lenders did not obtain a valid lien interest in the property.

The Recording Process

While it is in the best interests of a grantee to record a document as soon as possible, there is no time limit for recording (except in the case of mechanics' liens). A document is

deemed recorded when it is deposited in the recorder's office and marked "filed for record." The recorder gives each document a filing number indicating the order in which the document was received and time-stamps the document.

The recorder transfers the document to the appropriate book of records. Documents are indexed alphabetically by grantor-grantee, showing the name, nature of the recording, date of recording, and reference where the document is filed.

Ordinarily, the document is photocopied and the original returned to the person indicated as the recipient in the heading of the document.

If the recorder improperly indexes a document, the recording does not provide constructive notice. The duty to see that a document is recorded properly falls on the person recording.

CASE STUDY In the case of *Hochstein v. Romero* (1990) 219 C.A.3d 447, an abstract of judgment was improperly indexed. The court held because the abstract was not locatable by search, it did not impart constructive notice. It must therefore be treated as if it were never recorded, and a bona fide purchaser for value took title free of the judgment lien.

The name of the grantor and grantee must be signed legibly or printed for the recorder.

The recorder will not accept for recording a document that is not in English unless a certified English translation is attached to it.

A judgment can be recorded in more than one county and would apply to the property within the counties where recorded. A certified copy can be used to record in more than one county.

Counties may now allow electronic recording at county option.

The recorder will not record until the recording fee is paid. The county recorder also will require that the documentary transfer tax (tax on seller's equity being conveyed) be paid before recording deeds.

The county recorder will require that deeds contain the name and address to which tax statements are to be sent. Failure to comply, however, does not affect constructive notice.

Any person has the right to check the county recorder's records.

Change of Ownership

As provided in Proposition 13, real property is reassessed upon sale. Therefore, transferees of ownership interests are required to file a change of ownership statement with the county recorder or tax assessor within 45 days after receipt of a request from the assessor. Failure to comply could result in a penalty of \$100 or 10% of the current year's taxes, whichever is greater.

SUMMARY

Ownership passed from government to private ownership in California under Spanish rule by the establishment of pueblos or towns. Under Mexican rule, large tracts of land, known as ranchos, were given out. The United States gave tracts of land to private owners under various homestead, timber, and mining acts. Additionally, large tracts were given to railroads and colleges. Government grants were known as patents. Only about half of the land in California is owned privately.

Real property consists of land and what goes with the land. Personal property, known as chattels, consists of movable property that does not automatically transfer with the conveyance of real property. Chattels real are personal property interests in real estate, such as lease interests, mortgages, and trust deeds.

Fixtures are former items of personal property that have become so affixed to real property that they are part of the real estate. In the absence of an agreement, three basic tests are used to determine whether an item is a fixture. They are intent, method of attachment, and adaptability.

Trade fixtures installed for the purpose of conducting a business or trade remain personal property and may be removed by the tenant.

While mobile homes attached to a foundation are considered real property, mobile homes not permanently attached are personal property.

A person having property in fee simple, the highest degree of ownership, owns it without time limitation, can convey it freely, and can pass it by inheritance.

Defeasible estates are estates that can be defeated or lost upon the happening of some event (estate on a condition subsequent).

Life estates are given for the life of a person. Upon the death of the life tenant, the life estate either reverts to the grantor or the grantor's heirs (a reversionary interest) or passes to a third person (a remainder interest). The life tenant cannot encumber the property beyond her lifetime.

Both fee simple estates and life estates are known as freehold estates. Nonfreehold estates are leasehold interests.

Recording gives constructive notice of an interest in real property. As a general rule, to be recorded, an instrument must be acknowledged. Possession also provides constructive notice to parties who acquire later interests in the property.

Recording does not give priority notice when the party recording had actual notice of a prior unrecorded interest. Recording of a deed given without consideration would not take precedence over a prior unrecorded interest given for good and valuable consideration.

Defective recording that would not reveal an interest by a diligent search of the records does not give constructive notice.

The recording process involves depositing the document with the county recorder. It is marked “filed for record” and given a number. The document then is transferred to the appropriate book of records and the original is returned to the person recording. The recorder keeps an alphabetical grantor-grantee index.

DISCUSSION CASES

1. The county assessor assessed the plaintiff’s leasehold interests in the *Queen Mary* as real property. The plaintiff claimed that it was attached to a floating vessel, so the interests were personal property. **Considering the manner in which the vessel is attached to its pier and its adaptability, is the *Queen Mary* real or personal property?**

Specialty Restaurants Corp. v. County of Los Angeles (1977) 67 C.A.3d 924

2. Two trust deeds were presented to the recorder at the same time. The trust deed intended to be recorded second was recorded first, and the trust deed intended to be recorded first was recorded second. The trust deed that was recorded second stated on its face that it was to be a first trust deed. **Which trust deed has priority?**

Phelps v. American Mortgage Company (1936) 6 C.2d 604

3. A dealer negotiated a franchise with a beverage firm. A recorded mortgage showed the dealer to be a corporation. **Was the prior recorded mortgage constructive notice to the beverage firm that the dealer was a corporation?**

Nesbitt Fruit Products Inc. v. Del Monte Beverage Co. (1966) 177 C.A.2d 353

4. A notary personally did not know the person who, it was claimed, had acknowledged a document, and the executing party was not present when the notary acknowledged the signature. **Does the recording give constructive notice?**

Thomas v. Speck (1941) 47 C.A.2d 512

5. A delivered deed provided that it was not to take effect until the grantor died. **Was this a valid conveyance?**

Lowe v. Ruhlman (1945) 67 C.A.2d 828

6. A recorded mortgage indicated one date for its execution, and the acknowledgment was dated five days later. The trustee in bankruptcy sought to set aside the instrument and make the creditors unsecured. **Does the discrepancy affect the constructive notice of recording?**

Clements v. Snider (1969) 409 F.2d 549

UNIT QUIZ

1. Real property includes
 - a. growing annual crops.
 - b. mineral rights.
 - c. leasehold interests.
 - d. trust deeds.
2. Which is *NOT* an example of chattels real?
 - a. Furniture
 - b. Trust deeds
 - c. Lease interests
 - d. Shares in a housing cooperative
3. Which would be classified as personal property?
 - a. Mineral rights
 - b. An oil lease for 10 years
 - c. Fixtures
 - d. Riparian rights
4. Which is *NOT* an important test of a fixture?
 - a. Cost
 - b. Intent
 - c. Method of attachment
 - d. Adaptability
5. Which is *NOT* an appurtenance?
 - a. A right of egress
 - b. Mineral rights
 - c. Water rights
 - d. Trade fixtures
6. A new mobile home located in a rental park in 2022 was not attached to a foundation. It would be taxed
 - a. as real property.
 - b. as personal property.
 - c. as a vehicle with fees to the Department of Motor Vehicles.
 - d. with fees paid to the Department of Housing and Community Development.

7. Which is a characteristic of an indefeasible estate?
 - a. It cannot be canceled.
 - b. It can be lost upon a happening.
 - c. It is voidable.
 - d. It is a reversionary interest.

8. Which statement *BEST* describes a fee on a condition subsequent?
 - a. Ownership interest that does not transfer to grantee until something happens
 - b. A qualified interest that may be lost should something happen
 - c. A recording charge that need not be paid until the property is sold
 - d. A nonfreehold interest

9. The future interest of a grantor of a life estate would likely be a
 - a. reversionary interest.
 - b. contingent remainder interest.
 - c. vested remainder interest.
 - d. nonfreehold estate.

10. A future uncertain interest of possession would *MOST* likely be a
 - a. personal property interest.
 - b. vested remainder interest.
 - c. contingent remainder interest.
 - d. life estate.

11. Which is a right of a life tenant?
 - a. To refuse to pay taxes
 - b. To lease the property
 - c. To convey the interest by will
 - d. To encumber the reversionary interest

12. Which is *NOT* a characteristic of fee simple ownership?
 - a. Nonfreehold interest
 - b. No time limit
 - c. Freely transferable by owner
 - d. Inheritable

13. Henry willed his property in trust with the beneficiaries to be all future heirs of his body. His action is prohibited by
 - a. the statute of limitations.
 - b. the rule against perpetuities.
 - c. laches.
 - d. the recording statutes.

14. Albert received a life estate in property, but the property had a mortgage against it. Which statement is *TRUE* regarding this situation?
 - a. Mortgage payments are the responsibility of the remainder interest holder.
 - b. The mortgage nullifies the life estate.
 - c. The life tenant pays the interest, but the remainder interest pays the principal.
 - d. The mortgage payment is split evenly between life tenant and remainder holder.
15. Which is a characteristic of an estate in real property?
 - a. It can exist within another estate.
 - b. It will always run forever.
 - c. It requires possession.
 - d. It is a nonfreehold interest.
16. What is the result when the grantee records a deed that states that it may *NOT* be recorded?
 - a. The recordation does not give constructive notice.
 - b. The deed has been voided.
 - c. The title reverts to the grantor.
 - d. The recording gives constructive notice.
17. A person who states that her signing is a free act would be making
 - a. an affirmation.
 - b. an acknowledgment.
 - c. a notarization.
 - d. a verification.
18. Anne sold property to Bob. Bob took possession but did not record his deed. Anne learned of this and immediately sold to Claude. Claude recorded his deed. Which decision would a court of law *MOST* likely render?
 - a. Claude wins because he did the proper thing by recording his deed.
 - b. Claude wins because he had no notice.
 - c. Bob wins because he was in possession.
 - d. Bob wins because he purchased first.
19. Which is *NOT* true of recording?
 - a. It provides constructive notice of the recorded instrument.
 - b. It provides actual notice of an interest.
 - c. It determines the priority of liens.
 - d. It creates a presumption of delivery.

20. Priority of trust deeds can easily be ascertained by the
 - a. date of recording.
 - b. date of the instrument.
 - c. heading of the instrument.
 - d. date on the note.

21. Adolph sold to Betty on January 1. Betty took possession on January 15 and recorded her deed on February 1. Adolph obtained a home equity loan on the same property on January 10. The lender, Clement, recorded the same day. On January 20, Adolph sold the same property to Don who recorded on January 21. What are the rights of the parties?
 - a. Don has title subject to Clement's lien.
 - b. Betty has title clear of any lien.
 - c. Betty has title, but Clement has a valid lien against it.
 - d. None of these.

22. A recorded gift deed would *NOT* take priority over
 - a. subsequent recorded deeds for value.
 - b. a prior unrecorded deed given for valuable consideration.
 - c. subsequent trust deeds.
 - d. prior unrecorded gift deeds.

23. What would result when Albert deeded to Henry, but Henry inadvertently recorded in the wrong county?
 - a. Albert would retain title.
 - b. Between Henry and Albert, Henry would have title.
 - c. The minor defect in recording would not affect the constructive notice.
 - d. The deed could be voided upon return of consideration.

24. The county recorder indexes deeds by
 - a. time received.
 - b. location.
 - c. grantor's and grantee's names.
 - d. tax assessor's number.

25. Which is *TRUE* regarding recordation?
 - a. A document can be recorded in more than one county.
 - b. To be recorded, deeds must include the name and address where tax statements are to be sent.
 - c. The duty to see that the instrument is properly recorded falls with the person recording the instrument.
 - d. All of these are true.

8

UNIT EIGHT



OWNERSHIP OF REAL PROPERTY

KEY TERMS

attractive nuisance
doctrine
CERCLA
common elements
common interest
subdivision
community apartment
project
community property
community property
with right of
survivorship
condominium
corporation
fictitious name

general partner
homeowners association
(HOA)
joint tenancy
joint ventures
limited common
elements
limited liability
limited liability company
limited partnerships
partition action
partnership
planned unit
development

recreational user
immunity
real estate investment
trust
severalty
standard subdivision
stock cooperative
survivorship
tenancy by the entirety
tenancy in common
time-share
undivided interest
subdivision
unincorporated
association

Every property must have an owner. In Pennsylvania, a 600-acre forest that was deeded to God reverted to the state *for nonpayment of taxes*.

While use of property may be restricted by zoning or covenants, conditions, and restrictions, the owner's rights are inviolate except for creditor interests and the government's right of eminent domain.

CASE STUDY This is the case of *Sei Fujii v. State of California* (1952) 38 Cal.2d 718.

The *California Alien Land Law of 1913 (Webb-Honey Act)* prohibited aliens who were ineligible for citizenship from owning agricultural land. The act was the result of an anti-Asian feeling, primarily against Japanese people who relocated to California rural areas from Hawaii around 1900. The Japanese immigrants were farmers and established truck farms competing with farmers who were American citizens.

The law was upheld by the U.S. Supreme Court in 1923 and again in 1946. However, the California Supreme Court invalidated the law in 1952 as a violation of the equal protection clause of the Fourteenth Amendment to the Constitution.

OWNERSHIP IN SEVERALTY

Ownership in **severalty** is ownership by one individual or corporation. (A corporation is a legal entity.) It is singular ownership with no other party or parties having a common ownership interest. A city (municipal corporation) would own city property in severalty, as would an individual owning property by himself.

TENANCY IN COMMON

A **tenancy in common** is undivided ownership—of real or personal property—by more than one party without the right of survivorship. An undivided interest means that the tenant in common has a share in the whole and not ownership of a separate portion. For example, a tenant in common having a one-half interest in 10 acres of land would have a one-half interest in the entire 10 acres and not one-half of the land (5 acres).

The right of **survivorship** means the right of other co-owners to receive one co-owner's interest upon his death. Upon the death of a tenant in common, his interest does not pass by survivorship to the other tenants in common. The interest passes by will or intestate succession to the heirs of the decedent. If the tenant in common dies intestate (without a will) and leaves no heirs, the interest will escheat (pass) to the state. (Unmarried partners who live together will often choose tenancy in common as their form of ownership when the survivorship feature is not desired.)

Interests of tenants in common do not have to be equal and can be created at different times by different instruments; however, each tenant in common has an equal right of possession. Therefore, if one tenant in common is in sole possession of the premises, that tenant in common will not be obligated to the other tenants in common for rent unless agreeing to it. A tenant in common cannot, in the absence of an agreement to the contrary, exclude other tenants in common from the property.

One tenant in common cannot give an exclusive lease to a third party without the agreement of all the tenants in common because such a lease would be inconsistent with the other tenants' equal rights of possession.

A tenant in common who farms the property does not have to share the crops with the other tenants in common. However, if a tenant in common receives rents or royalties from a third person, the other tenants in common have the right to share in the income based on their proportional ownership.

See *Black v. Black* (1949) 91 C.A.2d 328 for rights of a tenant in possession.

If one tenant in common pays reasonable and necessary property expenses or taxes, that tenant is entitled to recover proportional shares of the expenditures from the other tenant(s) in common.

While a tenant in common can get contributions for repairs, one tenant in common cannot get contributions for improvements from the others if the others have not agreed to the improvements. Otherwise, it would be possible to make unauthorized improvements beyond the payment ability of another tenant in common. The result would be that tenants in common who could not pay their share of the cost could end up losing their interest.

One tenant in common can get an injunction against another tenant in common to stop waste. One tenant in common also can force another to make an accounting for rents, royalties, expenses, and profits of a property held in common.

Under extremely unusual circumstances, a tenant in common who has exclusive use may acquire title from the other tenants in common based on adverse possession. Should a tenant in common who has exclusive possession of the jointly owned property clearly indicate that her possession is intended to preclude the possession by the other tenants in common, that action could be considered an ouster. The tenant's use would be hostile and would enable her to obtain title by adverse possession by continuing the open, notorious, and hostile use continuously for a five-year period and paying the taxes for that period (see Unit 9).

No consent of the other tenants in common is required to transfer an interest or even a portion of an interest to another.

Individual tenants in common can encumber their own undivided interest. Any subsequent foreclosure by a creditor would apply only to the interest of that tenant in common.

A conveyance to two or more people, other than spouses, that fails to indicate how title is to be held will pass title as a tenancy in common.

JOINT TENANCY

Joint tenancy, like tenancy in common, is an undivided interest in either real or personal property (or both). Unlike a tenancy in common, however, joint tenancy has the right of survivorship. Upon the death of a joint tenant, the interest the deceased joint tenant held ceases to exist. The interest is incapable of being transferred by will or by intestate succession. The surviving joint tenants receive the interest of the deceased joint tenant. Joint tenancy property does not need to be probated, because it could not be part of the estate of the deceased person. Because of survivorship, the property interest passes to the surviving joint tenants free of claims of the personal creditors of the deceased.

Assume Annie, Brenda, and Connie are joint tenants. If Connie dies, Annie and Brenda will be joint tenants. If Brenda then dies, Annie will be an owner in severalty.

Annie _____ Brenda _____ Connie Joint tenants

Each owns an undivided one-third interest.

Connie dies:

Annie _____ Brenda _____

Annie and Brenda are joint tenants; each owns an undivided $\frac{1}{2}$ interest.

Brenda dies:

Annie _____

Annie owns the entire property in severalty.

Because corporations can live forever, which would defeat survivorship, corporations cannot hold title as joint tenants. Also, because of potential conflicts with community property laws, an unmarried person ordinarily should not own property in joint tenancy with a married person unless the spouse of the married person signs a quitclaim deed or otherwise consents to the joint tenancy.

The legal principle that a murderer cannot inherit from the victim applies to joint tenancies. The courts will not allow the murderer to profit by survivorship. They will view the victim as being a tenant in common, and the interest will pass to the heirs.

In the event of the simultaneous deaths of all of the joint tenants, the Uniform Simultaneous Death Act will treat the interest of the individual joint tenants as if they had survived the other(s). This would result in separate probates of each of their interests.

For title purposes, when a joint tenant dies, the survivor(s) should record, in the county where the property is located, either

- a certified copy of a court decree determining the fact of death and describing the property, or

- a certified copy of the death certificate (an affidavit identifying the deceased as one of the joint tenants in described property) and an affidavit of survivorship normally would be attached.

Creation of Joint Tenancy

The conveying instrument must expressly state that ownership will be held in joint tenancy; otherwise any conveyance to two or more people, other than spouses, will be considered a conveyance to tenants in common.

Two couples could own property as tenants in common, with each couple's interest a joint tenancy. A deed could express this through language such as "Tom and Helen Smith (as joint tenants) as tenants in common with Frank and Ethyl Jones (as joint tenants)." Also required to create a joint tenancy are the four unities of

1. time,
2. title,
3. interest, and
4. possession.

Memory Tool: TTIP

Time Joint tenants must get their interests at the same time. Formerly, if a person who owned property in severalty wished to create a joint tenancy with another, the grantor had to convey interest to a third party (a straw man), who would then convey the property back to the grantor and the other party(ies) as joint tenants. One problem with this procedure was that if any judgments against the straw man existed, they would become encumbrances on the property the instant the straw man took title. The property conveyed as the joint tenancy thereby could be subject to liens. Now, Section 683 of the Civil Code makes it unnecessary to follow this procedure. A joint tenancy can be created by an owner simply deeding the property to himself and the other party(ies) as joint tenants.

Title Joint tenants must acquire their interests by the same document.

Interest Joint tenants, unlike tenants in common, must have equal interests. A grant that provides for unequal interests will create a tenancy in common even if it states that the property being conveyed will be owned in joint tenancy.

Possession Possession is the only one of the four unities that is also applicable to tenants in common. The joint tenants' rights as to use and contributions are identical with those of tenants in common.

Termination of Joint Tenancy

The sale or transfer by a joint tenant of an interest terminates the joint tenancy as it applies to that interest.

Assume Art, Bart, and Curt are joint tenants. If Curt sells to Dirk, then Art and Bart will remain joint tenants, each with an undivided one-third interest, and Dirk will have an undivided one-third interest as a tenant in common.

Art _____ Bart _____ Curt Joint tenants

Art _____ Bart _____ Curt



Dirk

If Bart dies, Art will take Bart's interest by survivorship, and Art will be a tenant in common with Dirk. The joint tenancy cannot continue because no two owners have the four unities of joint tenancy. Art will have an undivided two-thirds interest as a tenant in common with Dirk, who will be a tenant in common with an undivided one-third interest.

Art _____ Dirk Tenants in common

One of the problems with a joint tenancy is that joint tenants can convey their interest to another, and the other joint tenant(s) might be completely unaware that the survivorship rights have been defeated.

CASE STUDY The case of *Riddle v. Harmon* (1980) 102 C.A.3d 524 held that one joint tenant can terminate the joint tenancy by a conveyance to herself as a tenant in common.

Bankruptcy of a joint tenant terminates the joint tenancy as it applies to the bankrupt party's interest.

A judgment against one joint tenant does not sever the joint tenancy, but levying execution against the property and having a sale does end the joint tenancy. If the joint tenant dies before the execution of the judgment against the property, the property will pass free and clear of the debt to the surviving joint tenant(s).

Individual joint tenants can borrow on their personal interest without destroying the joint tenancy. If the loan is foreclosed, the joint tenancy, of course, will be broken. However, if the borrower dies, the surviving joint tenant(s) will get the interest free and clear. In lending on a joint tenant's interests, a lender would want to couple the loan with a life insurance policy that would pay off the loan in the event of the borrower's death.

Because of changing relationships, a person might no longer wish to remain a joint tenant or tenant in common. In that case, a **partition action** can be brought to break up the joint tenancy or tenancy in common. If possible, the court will order the property divided among the co-owners.

When division is not possible or practical, the property will be sold under judicial supervision and the sale proceeds divided among the co-owners.

CASE STUDY In the case of *Formosa Corp. v. Rogers* (1952) 108 C.A.2d 397, the plaintiff sought a sale of a movie studio where Mary Pickford Rogers owned a 41/80 ownership. The court held that the party seeking partition by sale had the burden of proof that sale was necessary for equitable distribution. In this case, the court determined that the value of the separate properties was less than the value of the whole because the property as a whole had added value resulting from its adaptation for use in making motion pictures.

Note: A number of states, other than California, have a special form of joint tenancy for husband and wife known as **tenancy by the entirety**. It differs from joint tenancy in that neither spouse can separately convey an interest during the lifetime of the other spouse. California obtains this objective by the concept of community property.

COMMUNITY PROPERTY

Community property, originally a Spanish concept, holds that property acquired by a couple during marriage is owned equally by both spouses. This principle differed greatly from the early English concept that the wife's property became the property of the husband.

As noted earlier, the Treaty of Guadalupe Hidalgo ending the Mexican War in 1848 called for the rights of Mexican ownership of property to be respected. Mexico had adopted the Spanish concept of community property. The California Constitution specifically adopted the community property concept.

There are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Puerto Rico allows ownership of community property, and in Alaska, parties can agree to community property ownership.

Formerly, in California, property acquired in the wife's name alone was presumed to be her separate property. Now, property acquired by either spouse alone during marriage is presumed to be community property. The burden of proving it to be separate property falls on the spouse claiming separate property.

Property that is acquired with community property funds is community property.

Property that is acquired by one spouse using the credit of the other spouse is community property.

Separate property remains separate property unless it becomes commingled so as to be indistinguishable from community property, in which case it could become community property by the commingling. One spouse's use of community property to improve the separate property of the other spouse is considered a gift and is not commingling. One spouse's use of community property to improve their separate property could be commingling, which would convert the separate property to community property. However, the courts are more likely to give a community property interest proportionally based on the community property investment.

Exclusions

In California, excluded from the equal ownership of community property are

- property separately owned by husband or wife before marriage,
- rents and profits from separate property,
- property acquired by either spouse by gift or inheritance,
- property acquired with separate property funds,
- damages received for personal injuries, and
- earnings and accumulations of a spouse while living separate and apart (includes legal separation).

CASE STUDY The case of *Marriage of Rico* (1992) 10 C.A.4th 706 involved a couple who lived together and purchased a house as tenants in common before their marriage. After their marriage, they refinanced their home and converted title to joint tenancy. In dividing the community property upon the couple's divorce, the court determined that the individual parties should receive their separate property contribution before the appreciated value was equally divided. However, the court ruled that proper measure of reimbursement was the fair market value of each spouse's separate property at the time of conversion to community property, not the original contribution. This case shows how complicated the division of separate and community property can become upon dissolution of marriage.

CASE STUDY *In re Marriage of Branco* (1996) 47 C.A.4th 1621 involved a situation where community property funds were used to pay off a mortgage on the separate property of one spouse. The court held that the community is entitled to its share of the appreciation during the marriage.

Generally, when there is no marriage, there is no community property. When one or both spouses believe that a valid marriage existed, however, the property acquired that would have been community property had a valid marriage existed will be considered quasi-marital property and will be divided as if it were community property.

Domestic Partnerships

As of January 2005, same sex domestic couples, although not married, may register with the California Secretary of State. Property acquired with earned income after registration will be considered equally owned as if community property. This registration is also available to unmarried opposite sex couples where one party is at least 62 years of age.

Note: The purpose of domestic partnerships for older, opposite sex couples was likely to allow couples to retain greater Social Security benefits and also have property rights similar to community property.

CASE STUDY *Estate of Leslie* (1984) 37 C.3d 186 involved a couple married in Mexico who lived together for nine years in California. The probate court determined that the marriage was invalid because it was not recorded as required under Mexican law. The supreme court reversed the decision and held that as a matter of fairness, a putative spouse (reputed or commonly established spouse) is entitled to succeed to the property of the deceased spouse in the same manner as a legal spouse.

CASE STUDY *Estate of Vargas* (1974) 36 C.A.3d 714 involved a decedent who had led a double life. He had two separate families, neither of which knew of the other's existence. The Court of Appeal affirmed the trial court's finding that the second wife was a putative spouse even though the second marriage of 24 years was void. She had married with the good-faith belief that her husband had been divorced from his first wife. The court deemed it equitable to divide the property equally between the legal and putative spouses.

Premarital and Marital Agreements

Premarital agreements about property rights generally are valid.

Agreements entered into after marriage may be valid if undue influence is not a factor.

Many unmarried people living together enter into contracts concerning their property rights. These agreements may provide community-property-like rights should the relationship terminate, or may otherwise specify property rights and/or division of property. California courts will enforce these nonmarital agreements unless they are based on the consideration of sexual services.

CASE STUDY In the case of *In re Marriage of Stitt* (1983) 147 C.A.3d 579, a couple agreed to live together and combine their earnings. During this period, the woman acquired a vacant parcel of land in her name alone, and a residence was constructed with a loan in her name. Payments were made on the loan from a joint account. In a proceeding for dissolution of their subsequent marriage, the court held that the property was community property upon marriage. The parties had purchased the property with the intention that it be co-owned. The court held that unmarried cohabitants may enter into express or implied contracts respecting their property rights and earnings.

CASE STUDY The case of *Marvin v. Marvin* (1978) C. 3d 660 involved actor Lee Marvin and his live-in girlfriend of six years, Michelle Triola, who changed her name to Marvin. She claimed that Lee Marvin had promised to support her for life at the time they began living together.

The California Supreme Court ruled that Michelle Marvin had not proven the existence of the alleged contract and that California had abolished common law marriage in 1896. While nonmarital contracts—whether oral, implied, or written—may be enforced, they must be provable. The court also held that while unmarried couples can contract as to property division, if the agreement is explicitly based upon sexual services (as Lee Marvin alleged), it will be unenforceable.

Note: This was the “palimony” case that determined that living together did not in itself give property rights.

Community Property Rules

Before January 1, 1975, the husband was by law the manager of the community property. Community property assets were subject to the premarital and postmarital debts of the husband, but only the postmarital debts of the wife. Since January 1, 1975, each spouse has had coequal management and control of the community property. Community property now is liable for the debts of either spouse after marriage. The earnings of a spouse are not liable for the debts of the other spouse incurred before marriage. An exception to equal rights of management is that one spouse alone can have sole management of a business owned as community property.

Neither spouse can make a gift of community property to a third person without the other spouse’s permission, because this could defeat community property rights. A gift of one spouse to the other of property that would otherwise qualify as community property would become the separate property of the donee spouse.

A married person cannot use community property funds to form a joint tenancy with a third person. Despite the language of the deed, a tenancy in common would be formed, with the married person and spouse owning their shares as community property.

Community real property transfers, as well as leases for more than one year, require the signatures of both spouses. Neither spouse alone can encumber or obligate community real property.

Neither spouse can partition community real property by selling their one-half interest to another.

Neither spouse can encumber or sell the furniture or furnishings of the home without the other spouse. Neither spouse can sell the clothes of the other spouse or of the minor children without the other’s approval.

Because community property actually is owned equally by both spouses, either spouse can transfer their one-half interest by will. If a spouse dies intestate (without a will), the community property interest will pass to the surviving spouse without probate.

Community property is divided equally upon dissolution of marriage. For the purpose of division of property or separate maintenance only, joint tenancy property is presumed to be community property. To overcome this presumption, strong and persuasive evidence to the contrary must be present (Civil Code Section 4800.1). However, spouses are entitled to reimbursement for separate property contributions toward community property assets unless they have made a written waiver of that right (Civil Code Section 4800.2).

CASE STUDY *In re Marriage of Campbell* (1999) 74 C.A.4th 1058 involved a house owned by the husband before marriage. Because the husband had little income during the first years of marriage, the wife contributed money from her separate property to keep the marriage afloat. She also contributed \$34,000 to buy equipment for the husband's business, and \$66,000 to remodel her husband's house. The wife claimed that she relied on a promise to place her name on the title to the house. At marriage dissolution, she claimed an ownership interest in her husband's house claiming fraudulent conduct. The husband claimed that Family Code Section 852, which requires a written agreement, does not allow oral transmutation from separate to community properties. The wife claimed equitable estoppel as an exception to the statute of frauds.

The Sonoma County Superior Court ruled that the house was the separate property of the husband. The Court of Appeal affirmed, explaining that a writing is required for transmutation (conversion) of separate property to community property and extrinsic evidence could not be allowed. There must be a written agreement if separate property is to become community property.

Note: While contributions did not change separate property to community property, the wife could be entitled to her separate property contributions toward the property.

If property acquired in other states by California residents would have been considered community property had it been in California, it will be treated as community property upon marriage dissolution or death (quasi-community property). New residents of California should understand that once they take California residency, property owned in other states by one or both spouses will be regarded as community property if that property would have been community property had it been acquired in California.

A former advantage of community property over joint tenancy was that community property acquired a new cost basis stepped up to market value upon the death of a spouse, while only the deceased spouse's half interest in joint tenancy property acquired a new cost basis. This distinction has been removed by Revenue Ruling 87-98, which allows both joint tenancy and community property to acquire a new cost basis upon the death of a spouse if

the property was acknowledged as community property before the death of the spouse. For property that has appreciated in value, this reduces the taxable income upon a later sale to the difference between the new cost basis and the sales price.

Figure 8.1 shows the differences and similarities among tenancy in common, joint tenancy, and community property.

FIGURE 8.1: Common Ownership Forms

	Tenancy in Common	Joint Tenancy	Community Property
Parties	Any number of people (can be spouses).	Any number of people (can be spouses).	Only spouses.
Division	Ownership can be divided into any number of interests, equal or unequal.	Ownership interests cannot be divided and must be equal.	Ownership interests are equal.
Title	Each co-owner has a separate legal title to an undivided interest.	There is only one title to the whole property.	Title is the "community" (similar to title being in a partnership).
Possession	Equal right of possession.	Equal right of possession.	Equal right of possession.
Conveyance	Each co-owner's interest may be conveyed separately by its owner.	Conveyance by one co-owner without the others breaks the joint tenancy.	Both co-owners must join in conveyance of real property; separate interests cannot be conveyed.
Purchaser's Status	Purchaser becomes a tenant in common with the other co-owners.	Purchaser becomes a tenant in common with the other co-owners.	Purchaser can acquire only whole title of community, cannot acquire a part of it.
Death	Upon co-owner's death, the deceased's interest passes by will to the devisees or heirs; no survivorship right.	Upon co-owner's death, the deceased's interest ends and cannot be willed; survivor owns the property by survivorship.	Upon co-owner's death, half goes to survivor in severalty; up to one-half goes by will or succession to others (consult attorney with specific questions).
Successor's Status	Devisees or heirs become tenants in common.	Last survivor owns property in severalty.	If passing by will, tenancy in common between devisee and survivor results.
Creditor's Rights	Co-owner's interest may be sold upon execution sale to satisfy a creditor; creditor purchaser becomes a tenant in common.	Co-owner's interest may be sold upon execution sale to satisfy creditor; joint tenancy is broken, and creditor becomes tenant in common.	Co-owner's interests cannot be seized and sold separately; the whole property may be sold to satisfy debts of either husband or wife, depending on the debt (consult attorney with specific questions).
Presumption	Favored in doubtful cases except spouses (see Community Property).	Must be expressly stated and properly formed.	Strong presumption that property acquired by spouses is community property.

Community Property With Right of Survivorship (CPRS)

This form of ownership applies only to real estate instruments created after July 2, 2001 (Civil Code 682.1). To be effective, the **Community property with right of survivorship (CPRS)** ownership must be expressly declared on the deed. When one spouse dies, the surviving spouse, as in joint tenancy, takes title regardless of any will. CPRS, as in joint tenancy, avoids probate costs and delays. Before death, either or both spouses can terminate the tenancy by executing and recording a new deed as to their interests.

- The major reason for using the CPRS form of ownership rather than community property is that the CPRS property is not subject to the will of the deceased and must pass to the surviving spouse.

TENANCY IN PARTNERSHIP

Two or more people associated to carry on a business for profit compose a **partnership**. An agreement to share in the profits and losses would create a presumption of a partnership's existence.

A **general partner** is an active partner in the partnership who has unlimited personal liability for the debts of the partnership. A new general partner to an existing partnership would have unlimited liability for future debts of the partnership, but liability for the existing partnership debts would be limited to the extent of their contribution to capital (partner's investment).

Under the Uniform Partnership Act (Corporation Code Sections 15001–15004), general partners

- have equal rights to use partnership property for partnership purposes,
- cannot transfer their interests to another without the consent of the other partners, and
- the death or bankruptcy of a general partner dissolves the partnership.

Creditors of the partnership have first claim on the assets of a partnership. Partnership assets are not subject to attachment or execution for the private debts of the partners. However, bankruptcy of a partner would dissolve the partnership as it applies to the bankrupt partner, which would allow the creditors to reach the bankrupt partner's share of partnership assets.

Partners' interests are undivided. The interests need not be equal, but in the absence of any agreement, the partners have equal rights in the partnership.

Spouses of partners do not have a direct community property interest in partnership property. Partnership property can be conveyed by the partnership without the signatures of the spouses of the partners.

The heirs of a deceased partner have no right to the partnership business, because a partnership requires consent. The heirs are entitled only to the value of the deceased partner's share of the assets over the liabilities, or surplus, not to the continuing business.

General partnership agreements need not be in writing to be valid.

A partnership can acquire property in the name of the partnership. The recording of a statement of partnership that has been signed, acknowledged, and verified by two or more partners is proof of membership in the partnership. A bona fide purchaser for value from the partnership can rely on the statement about the identity of all of the partners and be protected against unnamed parties claiming a partnership interest.

If a partner takes title to partnership property in their separate name, other partners can claim their interests by showing it to be partnership property.

While a partner is entitled to an accounting of cash or property from other partners, a partner cannot sue the partnership; in so doing, the partner in effect would be suing himself.

A partner cannot compete with her partnership. See *Leff v. Gunter* (1983) 33 C.3d 508 for an example of this.

CASE STUDY *Enea v. Superior Court* (2005) 132 C.A. 4th 1559 involved a falling out between partners when a partner questioned the below-market rent being paid by one of the partners to rent the partnership property (his law office). The defendant moved for summary judgment on the grounds that Corporation Code 16404(b) and (c) state there is no duty or obligation when a partner's conduct furthers the partners own business. The defendant claimed that they owned no fiduciary duty to the plaintiff to pay fair market rent. After judgment for the defendant, the plaintiff appealed.

The Appeal Court reversed, ruling that the conduct of the defendant general partnership in charging themselves below-market rent violated their fiduciary duties as partners. They pointed out that a partnership is a fiduciary relationship, and partners cannot take advantages for themselves at the expense of the partnership.

Fictitious Name

A **fictitious name** is a name that does not include the surname of every partner. If a partnership fails to comply with the fictitious name statutes, the partnership cannot sue or defend a suit in the partnership name on contracts made using the fictitious name.

To comply with the fictitious name statutes, the partnership must

- file, within 40 days of beginning business, a fictitious name statement with the county clerk that identifies the principals, the business, and its fictitious name; and

- publish, within 30 days of filing, the fictitious name statement in a newspaper of general circulation within the county where the principal place of business is located, once a week for four successive weeks.

All fictitious name statements expire at the end of five years from December 31 of the year filed with the county clerk. Renewal statements again must be filed but need not be advertised.

A partnership can abandon a fictitious name by filing a statement of abandonment.

Taxation of Partnerships

An advantage that partnerships have over corporations is that partnerships do not pay income tax. Taxes are paid by the individual partners, while a corporation has double taxation: corporate profit is taxed, and then the stockholders also are taxed on their dividends.

Termination of Partnerships

Partnerships may be terminated by

- agreement,
- bankruptcy of a partner or the partnership,
- court order that results when a partner petitions the court for a dissolution of the partnership, or
- death of a general partner.

Joint Ventures

Joint ventures are partnerships for a single undertaking rather than a continuing business. Because a joint venture is set up for a limited purpose, the implied authority of its members is more limited than in a general partnership.

A joint venturer does not necessarily have the power to bind the other joint venturers. A joint venture is generally considered a partnership. A joint venture is taxed in the same way as a partnership (taxes are paid by the individual joint venturers), and joint venturers also have the joint and several liability of partners as to third parties. Unlike in a partnership, one joint venturer can sue the joint venture. The death of a partner automatically terminates a partnership, but the death of a joint venturer does not necessarily dissolve the joint venture. Control of the joint venture is normally given to a managing partner.

Limited Partnerships

Limited partnerships are partnerships in which the limited partners have limited liability rather than the unlimited liability of a general partnership. Limited partners are liable only to the extent of their investment. However, a limited partnership must have at least one general partner who has unlimited liability.

Limited partnership names must end with “A California Limited Partnership.” The agreement must be in writing, and a formal certificate of limited partnership must be filed. A limited partner cannot allow her name to be used in a manner that would indicate she is a general partner.

The 1983 Revised Limited Partnership Act (Corporation Code Sections 15611–15721) allows partners to contribute services, but not a promise concerning future services (formerly, a limited partner could not provide anything other than money).

A limited partner can get an accounting from the general partner, and the limited partners can oust the general partner for cause.

CASE STUDY The case of *BT-1 v. Equitable Life Assurance Society* (1999) 75 C.A.4th 1406 involved a partnership that owned real property. Equitable was the general partner, and BT-1 was the limited partner. Equitable purchased \$62.5 million in loans against the property for the discounted price of \$38.5 million. Equitable then demanded payment and took sole title to the property by foreclosure. BT-1 sued Equitable for its loss of equity as well as the gain from the discharge of indebtedness. While the trial court entered judgment for Equitable, the Court of Appeal reversed. It ruled that the acquisition of partnership debt by a general partner is a breach of fiduciary duty and the duty cannot be contracted away in the partnership agreement. Equitable was BT-1’s partner, not its lender, and it lost sight of this basic distinction in its haste to pounce upon the loan. A general partner cannot take advantage of a limited partner by self-dealing.

Relatively few new limited partnerships are being formed today because of the advantages offered by another form of operation known as the **limited liability company**, covered later in this unit.

Syndicates Syndicates are generally limited partnerships. Real estate syndicates fall under the jurisdiction of the Division of Corporations.

Real estate brokers are authorized by the Corporation Code to sell real estate security interests without having to obtain a broker/dealer license from the Division of Corporations.

An investor in a real estate syndicate has the advantage of the limited liability of a corporation investor. That is, the investor’s liability is limited to the amount invested.

A major attraction of syndicates to investors formerly was their unlimited tax shelter aspect; losses from depreciation could be passed through to the investors. Current tax laws do not allow the use of losses on these passive investments. Consequently, interest in syndicates has greatly diminished.

Trusts Property may be held in the name of a trust for a specific purpose, such as for a charitable purpose. Living trusts (revocable) are used for estate planning purposes, because probate can be avoided. Community property placed in a living trust would still entitle each spouse to community property interests.

REAL ESTATE INVESTMENT TRUSTS

Real estate investment trusts allow smaller investors to pool their resources for quality investments with limited liability. Under federal law, a **real estate investment trust (REIT)** is an unincorporated trust or association managed by a trustee that meets the following criteria:

- It cannot hold property for sale to customers in the ordinary course of business.
- It must be owned by at least 100 investors.
- Five people or fewer cannot hold more than a 50% interest.
- Interests must be in the form of transferable shares or certificates. California requires that each share carry with it an equivalent vote in determining trust policy.
- At least 75% of assets must be invested in real estate or cash.
- At least 90% of the trust's taxable gross income must be paid to investors.
- At least 75% of the trust's income must result from real estate-related sources.

If the real estate investment trust distributes 90% or more of its ordinary earnings to shareholders, it is taxed only on its retained earnings at the corporate rate.

The trustee in a real estate investment trust must have exclusive power to manage the trust. Trusts are either equity trusts (real estate), mortgage trusts (investments in mortgages and trust deeds), or hybrid trusts (investments in both real estate and mortgages).

Unlike syndicate interests, which are often difficult to resell, many REITs are listed on major stock exchanges so that interests are more readily salable.

CORPORATIONS

A **corporation** is a separate legal entity established under state law by the filing of articles of incorporation with the secretary of state. It can own property in the corporate name.

Shareholders of a corporation have limited liability and have no direct management of the corporation.

A disadvantage of corporations is double taxation. The corporation pays income tax on its profits and dividends paid to stockholders from the profits are taxed to the stockholders.

Shareholders elect the directors, who set corporate policy. The directors appoint the corporate officers, who operate the corporation. The authority of the corporate officers is set forth in the corporate bylaws, which are the rules of the corporation.

Because a corporation is a separate legal entity, shareholders can sue the corporation. Also, because it is a legal entity, corporations have an unlimited life and theoretically “live” forever.

A corporate conveyance that involves a sale of all or a majority of the corporate assets must be approved by a majority of the stockholders.

If a corporation exists in name only—that is, individual funds are commingled with corporate funds—the courts will “pierce the corporate veil” and determine that the corporation is in fact a partnership or sole proprietorship, and the limited liability protection of the corporation will be lost.

A closely held, or close, corporation is one in which the stock is held by a few people who actively control the business. Closely held corporations often are able to avoid significant corporate taxation by not showing a profit. They accomplish this through salaries, benefits, and bonuses to the officers, who are also the stockholders.

Foreign Corporations

A domestic corporation is a corporation organized in California. A corporation organized in any other state is a foreign corporation in California. To do business in California, a foreign corporation must get permission from the secretary of state; otherwise it cannot sue in California courts. The foreign corporation also must file, with the secretary of state, a consent to allow legal process to be served against the corporation by service on the secretary of state; this eliminates the need to go to the state of incorporation to bring suit.

S Corporations

As mentioned earlier, corporations are subject to double taxation. To avoid this, a small corporation can elect to be taxed as a partnership by becoming an S corporation. An S corporation must meet the following criteria:

- It must have fewer than 100 shareholders.
- Only one category of stock may be issued.
- All stockholders must be individuals, not corporations.
- The business cannot receive more than 20% of its income from interest, rents, dividends, and royalties. (This excludes many real estate–related businesses.)
- The corporation cannot be affiliated with any other corporation. It must be independent.
- It must be incorporated in the United States.

Limited Liability Companies (LLC)

Limited liability companies (LLCs) provide the **limited liability** protection of corporations without the regulations associated with S corporations. The advantages offered by an LLC have resulted in fewer decisions to form S corporations or limited partnerships. LLCs have operating agreements that are similar to corporate bylaws, but unlike corporations, they do not have perpetual existence. One or more members can file articles of organization with the secretary of state to engage in any lawful business activity. They must also file annual statements.

While it takes at least two members to form a limited partnership, one person can form an LLC. In a limited partnership, a limited partner would lose the liability protection by actively engaging in business matters. In an LLC, member activity does not affect the protection from personal liability.

UNINCORPORATED ASSOCIATIONS

An **unincorporated association** is a nonprofit organization that under common law could not hold title because it is not an entity. In California, however, unincorporated associations for religious, scientific, social, educational, recreational, or benevolent purposes may hold title to real property necessary for their purposes in the name of the organization. Property nonessential to the operation of the organization cannot be held for more than 10 years.

An unincorporated association can convey property by a deed executed by the president and secretary or others as authorized by the bylaws. Recording a verified certificate listing the names of officers and other people authorized to convey would be conclusive proof that a deed so executed was a properly executed conveyance.

In California, members of such associations are not personally liable for leases or purchases of property used by the association unless they agree to liability in writing.

MULTIPLE HOUSING DEVELOPMENTS

Under the Subdivided Lands Law, the division of property into five or more parcels for the purpose of sale, lease, or financing is considered a subdivision. Subdivision classifications include the following:

- **Standard subdivision:** A standard subdivision is a land division with no common areas.
- **Common interest subdivision:** A common interest is a division whereby owners own their unit, separate interests, and an area in common with other owners. Common interests include condominiums, planned developments, stock cooperatives, community apartment projects, and time-share projects.
- **Undivided interest subdivision:** An undivided interest is a development in which owners are tenants in common with all other owners without an exclusive right of ownership of a particular lot or unit. An example would be many of the large, member-owned recreational vehicle parks. Purchasers in an undivided interest subdivision have a three-day right of rescission. (The subdivision process and the Interstate Land Sales Full Disclosure Act are covered in Unit 13.)

There are several types of ownership forms for common interest and undivided interest subdivisions.

Condominiums

A **condominium** is an interest in real property consisting of an undivided interest in common in a portion of a parcel, together with a separate interest in space. The property can be residential, commercial, or industrial. Most condominium owners own their unit in fee simple.

A condominium may be a vertical subdivision, with the unit owner having a separate deed showing ownership of the airspace in fee simple but owning the common areas, including the land, as a tenant in common with the other owners.

Individual unit owners can encumber their unit interest separately without affecting the interests of the other owners. Each unit owner pays separate real property taxes that include a share of the common areas. Condominium owners may not sell their unit without conveying the rights to the common areas.

Areas for use of all of the owners in a common interest development are known as **common elements**. Common areas for the exclusive use of designated owners (such as a parking space or a storage locker) are known as **limited common elements**.

A **homeowners association** (HOA) board of directors, elected by the owners, is the governing body for the condominium. (Homeowners associations also govern cooperatives, community apartment projects, planned unit developments, and time-shares.) Homeowners associations can place reasonable assessments against the units, which if unpaid are liens against the individual units. Homeowners associations can record their lien against a member's property for unpaid assessments if the amount exceeds \$1,800. There is a 90-day redemption right after lien foreclosure. The HOA must notify the homeowner of the right of redemption. Membership in a homeowners association is generally a deed covenant that runs with the land. A homeowners association must prepare an operating budget and must perform a reserve study every three years to determine adequacy of reserves.

What are homeowner responsibilities and what is the responsibility of the homeowners association can be a matter of contention.

HOAs cannot prohibit an owner from keeping one pet subject to reasonable restrictions, nor can they prohibit solar panels or enforce any prohibition on water-efficient landscaping. They cannot prohibit a tenant from reasonable agriculture in portable containers but can specify reasonable container requirements.

HOAs cannot restrict construction of an accessory dwelling unit in a common interest development.

HOAs must allow at least 25% of units to be rented. There cannot be a blanket prohibition on rentals.

HOAs cannot prohibit placing religious items on the front door or entry frame.

If there is a drought state of emergency declared by the governor or local government, a homeowners association may not fine a homeowner for reduced watering or ceasing to water plants. If recycled water is used, the association can still fine owners for failure to

maintain landscaping, however HOA prohibition on replacing turf with low-water use plants are void and unenforceable.

HOAs may not prohibit clotheslines or drying racks in areas designated for the exclusive use of homeowners; however, the HOA may adopt reasonable rules for their use.

Civil Code 5500 sets forth duties of the board of directors of an HOA. The board has the responsibility of common area maintenance, enforcing covenants, conditions, and restrictions (CC&Rs), making certain that taxes are paid on common areas, as well as insurance requirements. In addition, board members have a fiduciary responsibility to govern in the best interests of the association. Corporation Code 7231 indicates that as long as directors perform their duties in good faith using the level of care an ordinary prudent person would use under similar circumstances would use, board members would not be held personally liable for their decisions. Failure to meet this standard could expose board members to personal liability. Directors and officers (D&O) liability insurance is available to provide legal defense and pay any damages connected with the HOA activities.

As long as the association carries the minimum coverage as specified by Civil Code 1365.7, the directors and officers will have no personal liability.

An HOA cannot prohibit a peaceful resident assembly, and no fee or insurance can be required for an assembly in a common area.

Owners in a common interest subdivision must provide an annual notice to their HOA as to their mailing address.

CASE STUDY The case of *Cunningham v. Superior Court* (1998) 67 C.A.4th 743 involved a homeowners association that was displeased with the housekeeping of a homeowner, although a city inspection found no building or fire code violations. Under threat of litigation, Cunningham allowed homeowners association representatives to inspect the interior of his unit. Association lawyers wrote to Cunningham demanding he clear his bed of all papers and books, remove paper and cardboard boxes from the floor around the bed and dresser, remove unused boxes and paper in the living and dining rooms, clear boxes and objects from the interior stairs, cease using the downstairs bathroom for storage, and maintain a functioning electrical light in the downstairs bathroom. The letter also suggested that Cunningham remove clothing that had not been used for five years and donate it to the Salvation Army.

A lawsuit resulted in a jury verdict in favor of Cunningham because the association had acted unreasonably. The association moved for a new trial and a judgment notwithstanding the verdict. The trial judge granted a new trial, stating that the association had acted “totally reasonably.”

The Court of Appeal set aside the new trial and remanded the case to trial as to the amount of damages. The association had clearly gone beyond any legitimate interest it may have had. The homeowners association cannot tell the homeowners how to maintain the interior of their unit.

CASE STUDY The case of *Dover Village Assn. v. Jennison* (2010) 191 C.A. 4th 123 involved a sewer line that ruptured beneath a homeowner's unit. The sewer line exclusively serviced the homeowner's unit and joined to the condominium project's main sewer line. The HOA claimed that the homeowner should bear the repair costs, and the homeowner contended it was common area and the HOA had the duty to maintain it.

The trial judge ruled that sewer pipes within the concrete slab were part of the common area and the HOA had a duty to maintain it. The homeowner was awarded attorney fees and costs.

The Court of Appeal affirmed, pointing out that a sewer system is one of interconnecting pipes and it would be unreasonable to differentiate between parts of the system.

CASE STUDY In the case of *Sui v. Price* (2011) 196 C.A. 4th 933, homeowners had a disabled vehicle parked in their exclusive parking space for three years before the HOA amended rules to prohibit storage of inoperable vehicles in parking spaces. The homeowners refused to remove the vehicle, and the HOA had it towed away. The homeowners sued for trespass and emotional distress and discrimination because the HOA association rule prohibits discrimination against owners.

The Court of Appeal upheld the trial court in that the new rules were not discriminatory and were reasonable.

Note: Just because only one homeowner is affected by a rule does not in itself make it discriminatory.

CASE STUDY In the case of *Multani v. Witkin & Neal* (2013), 215 C.A. 4th 1428, an HOA foreclosed on a homeowner for delinquency in HOA fees. The owner contested the legitimacy of the foreclosure. The trial court ruled for the HOA.

The Court of Appeal reversed, ruling that the HOA and its agents failed to prove that they had notified the owner of his right to redeem his condominium unit after the sale, as required by Code of Civil Procedures Section 729.050.

Note: Unlike trust deed nonjudicial foreclosures, HOA foreclosures for delinquent assessments are subject to a redemption right.

CASE STUDY The case of *Salchi v. Surfside 111* (2011), 200 C.A. 4th 1146 involved an attorney who purchased a condominium unit. She sued the HOA, claiming the common area was not properly maintained. Her expert witness was not available for trial, so she dismissed her complaint. The HOA filed a motion to recover \$250,000 in attorney fees. The trial court denied the motion.

The Court of Appeal reversed, holding that the HOA was entitled to reasonable attorney fees (Civil Code 1354).

Note: The case points out that litigious homeowners can get burned for actions they fail to win.

Stock Cooperatives

A **stock cooperative** is a corporation formed for the purpose of holding title to an improved property. Each shareholder has the exclusive right to the occupancy of a unit through a proprietary lease with the elected governing body. The transfer of shares also transfers occupancy by a sublease.

While condominium owners can freely transfer their unit, most cooperative associations have the right to approve the purchaser of stock before the stock seller can sublease to the stock purchaser.

There are two basic disadvantages of cooperatives:

1. The stockholder does not have ownership of a unit, so borrowing on equity can be more difficult.
2. There could only be one tax bill. If tax payments are not made by all owners, a lien can be placed on the entire property. If there is only one deed of trust, the failure of one or more owners to make their share of the payment also could result in the entire cooperative's being foreclosed unless the other owners pay the defaulting owner's share.

Sale of developments of five or more cooperative units fall under the jurisdiction of the real estate commissioner. Cooperatives with four or fewer units are under the jurisdiction of the corporation commissioner.

Community Apartment Projects

In a **community apartment project**, the owners purchase the property together as tenants in common with the right to exclusive occupancy of their units through a lease agreement.

Owners could have difficulty borrowing on their undivided interest. Because there is only one trust deed, the failure of one owner to pay could jeopardize all of the owners. Sale of owner's interest requires approval. Because of these problems, resale of an owner's interest could be difficult.

Sale of developments of five or more units are under the jurisdiction of the real estate commissioner.

Planned Developments

A *planned development*, better known as a **planned unit development (PUD)**, is a subdivision with the unit and the land under it owned by the individual unit. Areas for the use of all the owners, such as recreational facilities or common areas, are owned by all the owners as tenants in common. The major difference between a planned development and a condominium is that in a planned development, owners actually own their own land and not just airspace. Many California developments called condominiums are actually PUDs.

Time-Sharing Projects

A **time-share** is an interval or fractionalized ownership whereby the owner gets the exclusive use of a unit annually for a set period of time. Time-share interests may be in perpetuity, for life, or for a stated number of years.

Twelve or more time-share estates of five years or more are considered a subdivision and fall under the jurisdiction of the real estate commissioner. A real estate license is required to sell any time-share interests in California. Because of abusive sales tactics of some time-share developers, purchasers have a rescission right of seven days following their offer.

Time-shares are often marketed based on exchange privileges with other time-share developments. The buyer must be informed that the purchase does not guarantee a right to use or occupy accommodations other than the unit purchased.

A resort vacation club is similar to a time-share, except the investor does not purchase an ownership interest. The investor has the right to rent a unit and use club facilities. These developments are now under the control of the real estate commissioner and are classified as time-share projects.

Sale of Units

Before transfer of title, owners of condominiums, community apartment projects, cooperatives, and planned developments must provide purchasers with a copy of restrictions, bylaws, and articles of incorporation, plus an owners association financial statement including any delinquent assessments and costs.

An owners association must furnish the owner with a copy of the latest version of documents within 10 days of a request by an owner. A reasonable fee for doing this may be charged. A homeowners association cannot charge a transfer fee when units are sold that exceed their actual cost of changing their ownership records.

If there is an age restriction, a statement must be included that it can only be enforced to the extent permitted by law.

If there is a restriction on rentals, the existence of the restrictions must be disclosed. Rental restrictions cannot be placed that effect existing owners. Restrictions added to the CC&Rs can apply only to subsequent buyers.

OWNER LIABILITY

An owner of real property is liable for injuries to other people and/or property caused by negligence in maintaining or operating the property.

CASE STUDY In the case of *Salinas v. Martin* (2008) 166 C.A. 4th 1098b, a homeowner who was having construction work done at his residence allowed a contractor to store equipment and material in the fenced backyard. The contractor and his employee, Salinas, had permission to enter the backyard at any time to retrieve equipment and material. The homeowner also hired gardeners who had two pit bulls. The owner consented to the dogs running free in the yard when the gardeners were working. The contractor told the homeowner he was afraid of the dogs and that they should not be on the property. Salinas was attacked and bitten by the dogs when he attempted to retrieve material. He managed to get away by climbing on top of the owner's car.

The trial court granted summary judgment for the homeowner. The trial court used a residential landlord standard of care that requires actual knowledge that the dogs were dangerous.

The Court of Appeal reversed. Even though the homeowner had no knowledge of the danger, he allowed the gardeners to keep the dogs in the yard and permitted the contractor's entry. He could have prevented a problem by requiring that the animals be restrained. The homeowner, therefore, bears a measure of blame.

Note: The owner has a duty of care as to contractors.

Civil Code Section 1365.9 has given individual owners in a common interest subdivision some protection from liability resulting from injuries relating to the common areas. If the association carries specified minimum liability coverage, then the individual owners will not be held liable. The coverage required is as follows:

- At least two million dollars (\$2,000,000) if the common interest development consists of 100 or fewer separate interests
- At least three million dollars (\$3,000,000) if the common interest development consists of more than 100 separate interests

If dangerous conditions are obvious, an injured party might be denied relief if she could be said to have assumed the risk.

CASE STUDY The case of *Melton v. Boustred* (2010) 183 C.A. 4th 521 involved a defendant who advertised a house party on Myspace.com with live music and alcoholic beverages. At the party, several guests were stabbed by unknown people. The victims sued the homeowner for negligence and premises liability. The trial court sustained a demurrer to the complaint.

The Court of Appeal affirmed. The homeowner has no duty to a guest unless the homeowner creates a risk of criminal conduct that could injure a guest. Without knowledge that guests will be violent, the owner has no duty to foresee criminal conduct even though it was an open invitation.

Note: The plaintiffs asserted that the defendant had a duty to hire security guards and to control the number of guests.

CASE STUDY The case of *Privette v. Superior Court* (1993) 5 C.4th 689 involved an employee of an independent contractor who was injured by hot tar and sought to recover damages from the property owner (in addition to workers' compensation). The California Supreme Court held that employees of independent contractors, even those performing high-risk activity, can recover only their workers' compensation benefits and cannot receive damages from the property owner.

The duty of care an owner of real property owes to others extends beyond tenants or invitees. An owner's liability could extend to trespassers, as well as to neighbors who are injured because of dangerous conditions on the property.

CASE STUDY In the case of *Annocki v. Peterson Enterprises, LLC* (2014) 232 C.A. 4th 32, a customer leaving a restaurant attempted to take a left hand turn across Pacific Coast Highway in Malibu. He could not do so because there were paddles in the median that prevented a left turn. The driver attempted to back up into the driveway when a motorcyclist collided with the car, resulting in his death. The parents sued the restaurant. Their suit was dismissed based on a ruling by the trial judge that a business had no duty to warn the customer of the dangerous conditions of the highway.

The Court of Appeal reversed holding that the business should have posted signs advising customers that they could only turn right and that left turns were not possible. Failure to do so exposed the public to an unreasonable risk of injury.

CASE STUDY In the case of *Preston v. Goldman* (1986) 42 C.3d 108, the California Supreme Court held that a former owner is not liable for patent defects after the owner relinquishes possession and control. In this case, the Kubichans built a pond and then sold the property to the Goldmans, who leased it with an option to buy to the Reids. The two-year-old son of the visiting plaintiff fell into the pond and suffered brain damage. While the Court of Appeal held that a landowner who creates a dangerous condition is liable for resulting injuries after transfer, the California Supreme Court reversed, ruling that the controlling factors are possession and control as to liability for patent defects, so the previous owner was not liable.

An owner is not liable for “trivial” defects and need not maintain property in an absolutely perfect condition. See *Ursino v. Big Boy Restaurants of America* (1987) 192 C.A.3d 394.

CASE STUDY The case of *Brunelle v. Signore* (1989) 215 C.A.3d 122 involved a weekend houseguest who was bitten by a brown recluse spider. The guest sued the homeowner for damages. The court held that negligence exists only when there has been a breach of duty. In this case, brown recluse spiders had not previously been seen on the premises, so the defendant was held not to have a duty to prevent the spider bite. The court pointed out that an owner or occupier of a property is not an insurer of the safety of people on the premises.

Note: Many suits against homeowners are brought to collect damages from the owners insurance carrier.

Recreational User Immunity

Under Civil Code Section 846, an owner of an interest in real property owes no duty of care to keep the premises safe for entry by others for recreational purposes or to give warning of hazardous conditions. This does not apply to willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity that is not obvious.

Recreational user immunity is not limited to rural property, as indicated in *Ornelas v. Randolph* (1993) 4 C.4th 1095.

Attractive Nuisance

California has abandoned the **attractive nuisance doctrine** that placed strict requirements on property owners to protect child trespassers from dangerous conditions on their property. In California, owners are generally not liable for natural dangers and are only liable if they create or maintain a specified dangerous situation where there would be a reasonable expectation that children would be attracted. The requirement of foreseeability has reduced owner liability.

Owner liability for injuries to tenants and invitees is covered in Unit 15.

CASE STUDY The case of *Shipman v. Boething Treeland Farms Inc.* (2000) 77 C.A.4th 1424 involved trespassers who were injured when their all-terrain vehicle collided with a vehicle driven by a farm employee. The accident occurred at a tree-obstructed intersection on the property. The trespasser, Shipman, sued for negligent operation of a motor vehicle and premises liability. The superior court granted summary judgment for the defendant ruling that Civil Code Section 846 bars liability to recreational user trespassers.

The Court of Appeal affirmed, explaining that Section 846 affords broad immunity protection to property owners from liability to trespassers.

Note: Apparently, the immunity would extend even if the owner's employee had been driving negligently.

CASE STUDY The case of *Miller v. Weitzen* (2005) 133 C.A. 4th 732 involves an equestrian who was injured when her horse lost its footing while crossing a paved driveway that the riding trail went across. The property owner had paved the driveway without a permit. The rider belonged to the Rancho Santa Fe Association and her dues included a trail maintenance fee. She sued both the property owner and the Rancho Santa Fe Association for negligence.

The trial court ruled that Civil Code Section 846 (Recreational user immunity) protects both the property owner and the association from liability. However, there is an exception where a fee was paid. The trial court ruled that since the association received a fee, they were liable for the injury.

The Court of Appeals affirmed the ruling that the property owner was protected from liability and the fact that a paving permit was not obtained was irrelevant. The owners received no consideration, but the association was not so protected.

Note: There are two exceptions to the recreational user immunity statute:

- When consideration is paid to the landowner for entrance
- When the property owner knows of a dangerous condition that is not obvious, not clearly marked, or not disclosed

CASE STUDY In *New v. Consolidated Rock Prods.* (1984) 171 C.A.3d 681, two motorcyclists were injured when they drove their motorcycle over a 20-foot cliff at the end of an abandoned road. The owner had posted “no trespassing” signs, but the signs had little deterrent effect on motorcyclists. The court held that the defendant had acted willfully or in conscious disregard of the duty to warn plaintiffs of a dangerous condition under Civil Code Section 846 and was therefore liable for the resulting injury.

Hazardous Substance Disclosure

Health and Safety Code Section 25359.7(a) requires that owners of nonresidential real property before they sell or lease give notice to buyers or lessees of the release of hazardous substances that they know of; they also must give notice when they have reasonable cause to believe hazardous substances are located on or beneath the property.

Section 25359.7(b) requires that lessees (both nonresidential and residential) give written notice to owners regarding hazardous substances they know to have been released or believe to exist on or beneath the property. Failure to disclose constitutes a default by the tenant under the lease.

Lead Paint

Purchasers (and renters) of one to four residential units built before 1978 must be given a *Watch Out for Lead-Based Paint* booklet, and they have up to 10 days after signing the sales contract to have the residence inspected for lead-based paint. While sellers cannot refuse to allow this inspection, this right can be waived by the buyer. Foreclosed residences and housing designed for the elderly or disabled, where children under six years old are unlikely to reside, are exempt. Penalties include fines up to \$10,000, criminal prosecution, and/or treble damages to the buyer and/or renter.

When a landlord who receives federal subsidies or loans is confronted with deteriorating paint in a pre-1978 housing unit, the landlord must alert affected tenants to the possible health dangers and use government-certified workers and special containment practices to abate any risk of public exposure.

CERCLA

Under the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), owners, operators, and lessees of real property have cleanup liability for actual or threatened release of hazardous substances. Also liable are those who generated, transported, or disposed of the hazardous substances. Under federal law, landowners may raise the defense of innocence when they conducted appropriate inquiry before acquiring the property. Because California law requires prior owner and lessee disclosure, the defense of innocence will likely be removed if any disclosure was made.

CASE STUDY The case of *Wiegmann & Rose International Corp. v. NL Industries, Inc.* (1990) 735 F. Supp. 957 involved a sale of land where the seller had dumped hazardous waste. The sale provision included an “as is” clause. The court held that the “as is” provision in the deed did not absolve the seller because the purchaser of the contaminated property had no knowledge, actual or constructive, of the presence of hazardous waste. Applying federal law, the U.S. district court ruled that NL Industries was strictly liable for cleanup costs. The liability imposed by CERCLA (Comprehensive Environmental Response, Compensation and Liability Act of 1980) is not absolved by an “as is” clause.

In several states, the hazardous substance removal liens take precedence over all other liens, which could effectively wipe out a lender’s interests. While both California and federal laws set forth landowner liability for removing hazardous substances, neither California nor federal law provides for such super liens.

CASE STUDY The case of *United States of America v. Maryland Bank & Trust* (1986) 632 F. Supp. 573 involved a bank that foreclosed on a mortgage it held. At the foreclosure sale, the bank bid \$381,500 and took title to the property. The prior owners had used the site as a dump for hazardous waste. The EPA ordered the bank to clean up the site, and when it failed to do so, the EPA removed the toxic material at a cost of \$551,713.50. The bank was held liable for the cleanup costs. The court’s ruling indicates that lenders must protect themselves. Before lenders foreclose, they should consider possible liability from activities of former owners and tenants.

In California, the Code of Civil Procedure Section 726.5 allows a lender to waive its security interest (lien) on environmentally impaired property and to proceed directly against the borrower for the debt. In this way the lender is spared the possible liability of cleanup costs.

Disclosures are also required for natural hazards (see Unit 6).

Gatto Act

The Gatto Act gives cities, counties, and housing authorities the authority to compel cleanup of contaminated properties by a nuisance action. They also have the right to require property owners to disclose environmental information.

SUMMARY

Ownership of property can be held in the following forms:

- **Ownership in severalty:** This is ownership by one person or corporation alone.
- **Tenancy in common:** This is an undivided ownership by two or more people without the right of survivorship.
- **Joint tenancy:** This is an undivided interest by two or more people with the right of survivorship. Upon the death of a joint tenant, the deceased's interest immediately passes to the surviving joint tenant(s). To form a joint tenancy, the four unities of time, title, interest, and possession are necessary.
- **Community property:** Property acquired by either spouse during marriage is, with some exceptions, considered to be owned jointly and equally by both spouses. Both spouses must agree to the transfer or encumbrance of community real property.
- **Community property with right of survivorship:** This is community property where neither spouse can will their portion to a third party.
- **Domestic partnerships:** In California, domestic partnerships that are registered have property rights similar to community property.
- **Partnership:** A partnership is two or more people associated to carry on a business for profit. Property can be held in the name of the partnership.
- **Joint venture:** A joint venture is a partnership for a particular undertaking rather than a continuing business.
- **Limited partnership:** This is a partnership that has limited partners who are inactive and have limited liability. They are liable only to the extent of their investment. Limited partnerships must have at least one general partner who is active and has unlimited liability.
- **Real estate investment trust (REIT):** This type of trust, having 100 or more investors, issues certificates or shares to the investors. The shares are freely transferable.
- **Corporation:** A corporation is an artificial person created by law that can own property. Corporations pay taxes on their profits, and the dividends paid to the shareholders are taxed to the shareholders (double taxation). S corporations are small corporations that have elected to be taxed as partnerships to avoid double taxation.
- **Limited liability company (LLC):** Because of ease of formation (e.g., they can be formed by a single individual) and fewer restrictions, LLCs are becoming more popular with investors than limited partnerships and S corporations.
- **Unincorporated associations:** These are nonprofit organizations. In California, unincorporated associations for specific purposes can hold title to real property.

Following are a number of forms of ownership for housing developments:

- **Condominium:** A condominium interest is a separate interest in the airspace of a unit coupled with an undivided interest in common in the common areas.
- **Stock cooperative:** A stock cooperative is a corporation in which each shareholder also has a lease interest that entitles him or her to occupancy of a unit.
- **Community apartment project:** A community apartment project is an undivided tenancy-in-common interest in the real property, with each owner having the right to occupy a unit.
- **Planned development:** A planned development is a subdivision in which some areas are owned in common. Individual unit owners own their own units and the land under the units.
- **Time-share:** A time-share is a fractionalized ownership in which each owner has exclusive use of the property for a set time period.

Owners of real property are liable for injuries to other people and/or property resulting from negligence in maintaining their property. Owners, however, are not absolute insurers regarding the safety of others.

Owners generally have no duty of care to keep their premises safe for recreational users, but they must warn against known dangers.

Owners and lessees have duties of disclosure regarding hazardous substances, and owners can be held liable for removal of hazardous waste even when they were not responsible for the waste being on their property.

DISCUSSION CASES

1. When a property is given to two or more parties as life tenants, what is the relationship between the life tenants?

Green v. Brown (1951) 37 C.2d 391

2. One joint tenant used a property for 22 years, paid the taxes, and maintained the property. In a quiet title action, he claimed title to the entire property by adverse possession. **Does his claim have merit?**

Dimmick v. Dimmick (1962) 58 C.2d 417

3. A property settlement between joint tenants gave the former husband exclusive possession for life. The husband agreed not to convey his interest and to pay the taxes and maintain the property. **What is the form of ownership, and what are the rights of the former wife?**

Cole v. Cole (1956) 139 C.A.2d 691

4. A cyclist was injured in the Los Angeles National Forest when he was hit by a U.S. service truck. **Does the California recreational immunity protect the U.S. government?**

Klein v. United States of America (2010) 50 C. 4th 68

5. A corporation authorized to enforce the provisions of a recorded declaration of restrictions assessed residents for expenses incurred in suing the city to abate airport noise. The restrictions covered activities within the complex but not those outside the complex. **Was the assessment proper?**

Spitzer v. Kentwood Home Guardians (1972) 24 C.A.3d 215

6. Several investors purchased a 300-acre tract for \$71 million. The tract was to be broken up with parcels sold by the managing partner. It was agreed that the managing partner was not to receive any sales commissions. The managing partner marked up invoices by 5% without notifying his partners and received sale commissions in the form of kickbacks from brokers. **What, if any, damages are the other investors entitled to?**

Bardis v. Oates (2004) 119 C.A.4th 1

7. A man purchased a tenant-in-common interest in an island-type property used for waterfowl hunting. He wanted the entire parcel, but the other tenant in common refused to sell. He brought a partition action and asked that the property be sold. **Should the court order a sale?**

Butte Creek Island Ranch v. Crim (1982) 136 C.A.3d 360

8. A trespasser crawled through a hole in the fence of a paint-stripping plant. He climbed on top of a vat and fell through a thin plywood cover into acid. The owner who leased the premises to the operator was unaware of the vats of acid. **Is the owner liable for the injuries to the trespasser?**

Bisetti v. United Refrigeration Corp. (1985) 174 C.A.3d 643

9. A husband whose wife was in a mental hospital acquired an interest in real property with a woman with whom he was living. He used community property for his contribution, and she used her separate property. **Can they hold title as joint tenants?**

Yeoman v. Sawyer (1950) 99 C.A.2d 43

10. During the process of marriage dissolution, a husband alone gave a trust deed to property held in joint tenancy. The court later gave the wife title to the property. **What would be the effect of foreclosure of the trust deed?**

Kane v. Huntley Financial (1983) 146 C.A.3d 1092

11. While standing outside the door of an arcade, the plaintiff was shot by a security guard who had been hired by a tenant of the landlord. The guard was a convicted felon who was unlawfully in possession of the gun. **Is the landlord liable for the plaintiff's injury?**

Leakes v. Shamoun (1986) 187 C.A.3d 772

12. A law student was assaulted after leaving the school property and walking in a public area toward his car. The student alleged the school did not properly light the area. **Assuming the area was dark and the darkness allowed the student to be assaulted, is the school liable?**

Donnell v. California Western School of Law (1988) 200 C.A.3d 715

13. After leaving a convenience store, a customer was assaulted and injured in a vacant lot adjacent to the store, where customers often parked. The defendants had a nonexclusive right to use the lot for extra parking under their lease and knew customers used the lot. On several occasions, they had sought police assistance to remove loiterers from the lot. **What, if any, were the duties of the defendants?**

Southland Corp. v. Superior Court (1988) 203 C.A.3d 656

14. A husband signed a contract to sell community property. The buyer was unaware of the existence of the wife, who refused to perform, that is, sell. **Can the buyer obtain specific performance?**

Andrade Development Co. v. Martin (1982) 138 C.A.3d 330

15. A motorcyclist fell into a percolation test hole and sued the landowner as well as the responsible contractor and subcontractor. **Are the defendants entitled to raise the recreational use immunity?**

Jensen v. Kenneth Mullen Co. (1989) 211 C.A.3d 653

16. A wife quitclaimed her interest in a community property residence to her husband for value while separated. During subsequent reconciliations, she lived in the house with her husband, and community funds were used to pay the mortgage. **In a subsequent marriage dissolution, would the wife have a community property interest in the residence?**

Marriage of Broderick (1989) 209 C.A.3d 489

17. A lessee of 40,000 acres under a U.S. Forest Service grazing permit placed a barbed-wire gate across a Forest Service road to control his cattle. The land was also open for recreational users. The plaintiff drove his off-road motorcycle into the wire and was injured. **Is the lessee liable?**

Hubbard v. Brown (1990) 50 C.3d 189

18. A passerby slipped on dog feces on the public sidewalk in front of a store. The owner of the store did not create the hazard; however, a municipal ordinance required landlords to keep city sidewalks clean. **Is the landlord liable for the pedestrian's injuries?**

Selger v. Steven Bros. Inc. (1990) 222 C.A.3d 1585

19. A park brochure described a trail as safe for cycling and advertised its bikes. A tourist died from a cycling accident. **Does recreational immunity protect the defendant?**

Pau v. Yosemite Park (1991) 928 F.2d 880

20. Migrant farmworkers built a camp without the permission or knowledge of the owner. A fire in the encampment led to personal injury. **Should the owner of the property be held liable?**

Lucas v. Pollock (1992) 7 C.A.4th 668

21. A wife used \$40,000 of her separate property to extinguish a \$53,000 debt against community property. (The debtor agreed to settle for \$40,000.) **What were the wife's rights upon marriage dissolution?**

In re Marriage of Tallman (1994) 22 C.A.4th 1697

22. A five-year-old girl was jumping up and down on her bed in a second-story apartment. She sustained injuries when she fell through a window screen, dropping 30 feet. (The window ledge was 44 inches from the floor.) The building was in compliance with local codes, but the tenant claimed that the window should have had bars. **Is the landlord liable?**

Pineda v. Ennabe (1998) 61 C.A.4th 1403

23. Two couples owned a beachfront town house as partners. On default on the trust deed, one couple purchased the property at the lender's trustee's foreclosure sale. **Was this a breach of fiduciary duty?**

Jones v. Wagner (2001) 90 C.A.4th 466

24. A mother and her child were visiting a friend who had a pool. The mother and the homeowner were watching the children play in the front yard. When the mother went to make a phone call, her child went in the back yard and drowned in the pool. **Did the homeowner have a duty to supervise the child?**

Padilla v. Rodas (2008) 160 C.A.4th 742

25. A private farm road led to public road 172. There was no evidence of the public using the farm road. Because the road ran through rows of trees, farm vehicles traveled the road at relatively slow speeds. A truck from another farm used the private road to get to 172. It was moving at excessive speed and hit a van full of agricultural workers upon entering 172. **Was the farm owner negligent in failing to install a stop sign where the private road entered 172?**

Garcia v. Paramount Citrus Assn. (2008) 161 C.A.4th 321

26. In order to avoid foreclosure, a homeowner tendered a partial payment to an HOA that would have brought delinquent payments below \$1,800. The HOA refused the partial payment and proceeded with foreclosure. **Was foreclosure proper?**

Huntington Continental Town House Association v. Miner (2014) 230 C.A.4th 590

27. A tenant in a town house was distracted by a gardener and tripped when her foot struck a seven-eighths of an inch separation between sidewalk segments. She suffered extreme injuries. **Should the homeowners association be held liable?**

Cadam v. Somerset Garden Townhouse HOA (2011) 200 C.A.4th 383

28. Members of an LLC dissolved the LLC immediately following the receipt of over \$11 million from the sale of a property. The proceeds were distributed to the members, but the listing broker was not paid. Arbitration resulted in an award to the listing broker against the LLC. **Can the listing broker recover from individual members of the LLC?**

C.B. Ellis, Inc. v. Terra Nostra Consultants (2014) 230 C.A.4th 405

29. The CC&Rs of an HOA stated, “No activity shall be conducted in any unit or common area that constitutes a nuisance or unreasonably interferes with the use or quiet enjoyment of the occupants of any other condominium.”

The defendants removed the carpet in their unit and installed hardwood floors. The result was noise that was claimed to be, “greatly amplified and intolerable.” The defendants claimed the hardwood floors were necessary because the wife was severely allergic to dust. The association sought an injunction and declaratory relief. **Should the association prevail?**

Ryland Mews Homeowners Assn. v. Munoz (2015) 234 C.A.4th 705

30. The overflow parking lot of a church was across the street from the church. The plaintiff was hit by a car while crossing the street to the church. The plaintiff argued that even though the church would not be liable for offsite injuries, the church created the problem by selecting the parking location. **Should the church be held liable for the plaintiff’s injury?**

Vasilenko. v. Grace Family Church (2017) 3 CA 5th 1077

UNIT QUIZ

1. What would be the ownership form for property that is solely owned by a married woman?
 - a. Community property
 - b. Tenancy in common
 - c. Ownership in severalty
 - d. Ownership in partnership
2. Which ownership form is matched with an incorrect characteristic?
 - a. Joint tenancy/undivided interest
 - b. Tenancy in common/survivorship
 - c. Community property/equal ownership
 - d. Severalty/alone
3. To convey your property to a son and a daughter on a one-third/two-thirds basis, you would want to convey title as
 - a. community property.
 - b. tenancy in severalty.
 - c. tenancy in common.
 - d. joint tenancy.
4. Agnes and Alfred, who were recently married, want to purchase a house together. They each want their interest to pass to their individual children from previous marriages in the event of death. They should buy the house
 - a. in partnership.
 - b. in severalty.
 - c. as tenants in common.
 - d. as joint tenants.
5. A single tenant in common may *NOT*
 - a. sell her interest without approval of the other tenants in common.
 - b. will her interest to her children.
 - c. use the property without compensating the other tenants in common.
 - d. give exclusive possession to another.
6. Which statement accurately describes a tenancy in common?
 - a. Interests must be equal.
 - b. There is an equal right of possession.
 - c. Interests must be acquired at the same time.
 - d. Interests must be acquired from the same documents.

7. Albert, Baker, Charlie, and David are joint tenants. What form of ownership exists when David sells to Edith and Albert then dies?
 - a. Baker, Charlie, and Edith are tenants in common.
 - b. Baker and Charlie are joint tenants, and Edith is a tenant in common.
 - c. Albert's heirs, Baker, Charlie, and Edith, are tenants in common.
 - d. None of these describes the existing ownership.
8. Thomas and Andrew own property in joint tenancy. Thomas put a \$50,000 mortgage on his interest. A short time later Thomas died. Who owns the property and how?
 - a. Andrew owns the property clear of the mortgage.
 - b. Andrew owns the property with a mortgage against it.
 - c. Because the mortgage destroyed the joint tenancy, Andrew and the heirs of Thomas own the property as tenants in common.
 - d. Andrew and the mortgagee own the property as tenants in common.
9. Which is an example of a partition action?
 - a. Dividing an apartment building into condominiums
 - b. Any land subdivision
 - c. A court proceeding to divide jointly owned property
 - d. Breaking large apartments into smaller units
10. After Albert and Helen were married, they purchased a home. The \$40,000 down payment was the separate property of Helen. Payments on the home were made with community property funds. Upon marriage dissolution, what are the rights of the parties to the sale proceeds from the house?
 - a. Albert and Helen share the proceeds equally.
 - b. Albert gets one-half of the payments made, but Helen gets the remainder.
 - c. Helen is entitled to \$40,000 plus one-half of the balance of the sale proceeds (if any).
 - d. None of these is true.
11. Without the consent of the other spouse, one spouse can
 - a. buy real estate using community property funds.
 - b. sell community real property.
 - c. give community real property away.
 - d. lease community real property for 18 months.
12. According to community property rules, one spouse alone may
 - a. sell community real property interest.
 - b. encumber community real property interest.
 - c. will community real property interest.
 - d. do none of these.

13. Jim and Tom are general partners in a real estate office. Jim dies, leaving all his property to his wife, Lois, who is also a real estate broker. What is the result?
 - a. Lois and Tom are general partners.
 - b. Lois has an interest in the partnership assets but not in the business.
 - c. Lois becomes a limited partner.
 - d. Lois has no interest in the business or the assets of the business.
14. A partnership that has *NOT* complied with the fictitious name statute
 - a. would be a limited partnership.
 - b. cannot sue in the partnership name.
 - c. is an unincorporated association.
 - d. is all of these.
15. Which statement is *TRUE* of a joint venture?
 - a. One joint venturer can sue the joint venture.
 - b. The death of a joint venturer automatically dissolves the joint venture.
 - c. Joint venturers have the same power to bind other joint venturers as partners have to bind other partners.
 - d. All of these are true.
16. A new limited partnership must
 - a. end its name with "A Limited Partnership."
 - b. have a written agreement.
 - c. file a formal certificate of limited partnership.
 - d. do all of these.
17. Under federal law, a real estate investment trust must have
 - a. a corporate charter.
 - b. fewer than 100 investors.
 - c. 100 or more investors.
 - d. 1,000 or more investors.
18. Two separate corporations could hold title together as
 - a. tenants in severalty.
 - b. joint tenants.
 - c. community property.
 - d. a partnership.

19. Which is (are) true regarding income tax?
 - a. Partnerships do not pay income tax.
 - b. A disadvantage of corporations is double taxation.
 - c. An S corporation does not pay taxes.
 - d. All of these are true.
20. Rights of occupancy of owners in a cooperative are based on
 - a. a proprietary lease.
 - b. the articles of incorporation.
 - c. the bylaws of the association.
 - d. individual deeds to each unit.
21. Ownership as tenants in common with a right to occupy a unit describes a
 - a. cooperative.
 - b. community apartment project.
 - c. planned development.
 - d. None of these
22. Interval exclusive occupancy coupled with a joint ownership likely refers to
 - a. a cooperative.
 - b. a community apartment project.
 - c. an undivided interest subdivision.
 - d. a time-share.
23. The seller of a condominium property must provide the purchaser with
 - a. a copy of the restrictions.
 - b. the association bylaws.
 - c. the owners association financial statement showing delinquent assessments.
 - d. all of these documents.
24. An owner is likely to be liable to a recreational user of his property when
 - a. he fails to post No Trespassing signs.
 - b. he fails to warn against a dangerous condition.
 - c. the property is urban in nature.
 - d. all of these conditions exist.
25. Notice of known hazardous substances on the premises must be given by
 - a. owners to buyers.
 - b. owners to lessees.
 - c. lessees to owners.
 - d. all of these.

9

UNIT NINE



ACQUISITIONS AND CONVEYANCES

KEY TERMS

ademption	executor	probate
administrator	formal will	Proposition 99
adverse possession	gift deed	quitclaim deed
after-acquired title	grant deed	reservation in a deed
bequest	holographic will	sheriff's deed
codicil	Independent	simultaneous death
color of title	Administration of	tacking on
dedication	Estates Act	tax deed
deed	intestate succession	trustee's deed
devise	inverse condemnation	valid will
eminent domain	marketable title	warranty deed
escheat	per stirpes	will
exception in a deed	police power	

VOLUNTARY TRANSFERS OF REAL PROPERTY

Deeds

Before the statute of frauds, title was passed by a voluntary ceremony known as *livery of seisin*. The parties would physically indicate transfer of title through the symbolic transfer of a clod of earth, a twig, or a key. It became common for unscrupulous individuals, using perjured testimony, to claim a transfer when in fact a livery of seisin had not taken place. The statute of frauds was really enacted to defeat this type of fraud.

The statute of frauds requires that transfers of real property interests be in writing (Civil Code Section 1624). The **deed** is the transfer instrument in a voluntary transfer. When the deed is properly executed, delivered, and accepted, it transfers title to real property from a grantor to a grantee.

Requirements of a Deed

Written The statute of frauds requires that every instrument dealing in rights in real estate, other than a lease for one year or less, be in writing.

Execution The deed must be executed—that is, signed—by the grantor. The grantee, who receives the deed, need not sign the deed.

The grantor must sign the deed with the same name in which the grantor took title. If there is a material variance in the name, the recording of the deed will not provide constructive notice of the transfer. For example, a married woman who is conveying a title that she took before her marriage must identify the maiden name or different married name under which title was taken.

An attorney-in-fact may convey marketable title only if the power of attorney under which the deed is executed is acknowledged and recorded.

A deed that is executed in blank does not transfer title when a property description is inserted at a later date by another person unless that person was authorized to insert the description.

A forged deed is void and transfers no interest. A deed containing unauthorized alterations also is void. A criminal court can void false or forged deeds without the necessity of a quiet title action.

CASE STUDY The case of *People v. Sanders* (1998) 67 C.A.4th 1403 involved forgery of deeds. Wesley Sanders III forged 10 deeds on 11 parcels of property in Los Angeles County. He located property from tax collector lists of property to be sold at tax collector sales. He forged the owners' signatures (owners were deceased in most cases) and used a forged notary public stamp. He then redeemed the property by paying the taxes. Because of the large number of deeds transferred to him, the tax collector became suspicious and a sheriff's investigation resulted in Sanders being arrested, charged, and convicted of grand theft. Sanders was sentenced to five years in prison.

The Court of Appeal reversed the decision, and Sanders was released. The basis of the decision was that a forged deed is void, so no transfer of real estate was possible. In addition, Sanders had no contact with the owners, and there was no evidence of false pretense or misrepresentation.

Note: Sanders should have been charged with forgery and possibly conspiracy to defraud, but not theft.

Description The property must be described sufficiently so that no doubt exists about the identity of the property being conveyed, and the boundaries must be positively located. A legal description is not required on a deed, although title insurance cannot generally be obtained in the absence of a legal description.

Delivery To transfer title, a deed must be delivered. The most important element of delivery is the intent of the grantor. The grantor must intend to transfer title irrevocably to the grantee or a trustee and to divest the grantor of title immediately. The grantor's intent can be determined by words or acts before, at the time of, and after execution of the deed. In an actual delivery, the grantee receives the deed.

Although an agreement for a future transfer of title is not a delivery, a legal delivery is possible, even if the grantee's rights to possession and enjoyment of the property are to accrue at a future date. For example, a deed could be given in an irrevocable trust to be given to a grantee at a later date. The delivery of a deed to a third party where the grantor cannot get the property back is considered a constructive delivery.

Recording the deed creates a presumption that the deed was delivered. A deed also is presumed to have been delivered if it is in the possession of the grantee. However, if the grantor is in possession of the deed, it is presumed not to have been delivered. These presumptions can be overcome by evidence to the contrary, and legal delivery can be made even if the deed was not physically transferred.

A deed to more than one grantee need be delivered to only one of them for effective delivery. Delivery must be absolute; it cannot be conditional. For example, assume a deed is given to a third party to hold with the provision that it should be given to the grantor's son upon the grantor's death but it should be returned to the grantor upon the grantor's request. In that case, title would not pass because the transfer was conditioned on the grantor's not voiding it before death.

See *Stone v. Daily* (1919) 181 C. 571.

Acceptance To be valid, a deed must be accepted. The law will not force a person to take title. Acceptance generally is presumed if the grant is to the benefit of the grantee. Failure to repudiate a transfer within a reasonable time also will imply its acceptance. Acts, words, or conduct of the grantee could show an intent to accept. Any exercise of dominion over the property, such as repairing it, occupying it, placing a sign on it, putting the property on the market, or borrowing on the property, would show acceptance of the grant.

CASE STUDY In the case of *Brown v. Sweet* (1928) 95 C.A. 117, when the grantee received a deed in the mail, she immediately returned it to the grantor. Because she did not accept the deed, title was held not to have passed to the grantee.

If the grantee conditionally accepts the grant, title does not pass to the grantee until the conditions set are satisfied.

Granting clause While particular wording is not required, the language of the deed must clearly indicate a transfer of title.

Competent parties The grantor must be a competent party. In the case of a gift deed, however, the grantee can be an incompetent or a minor. In this situation, the legal representative of the incompetent or minor would accept the deed or acceptance could be presumed on the basis that the grant was beneficial.

Grantee The grantee must be identified. While a grant may be made to a real person using an assumed name, title cannot pass to a nonexistent person.

Not Required for Deeds

Acknowledgment Acknowledgment is made by a grantor before a notary public or another authorized person. The grantor acknowledges that the signing of the deed is the grantor's own free act. The notary has a duty to determine the identity of the person executing the document. The notary and the notary's sureties would be liable for negligence in ascertaining the identity of the person signing.

A deed need not be acknowledged to be a valid transfer, but without acknowledgment, the deed will not be accepted for recording. California notaries must now obtain the right thumbprint of the grantor of any deed in their record books.

CASE STUDY In the case of *Cordano v. Wright* (1911) 159 C. 610, a deed described the grantor as John McDonald, but it was signed and acknowledged by both John and Catherine McDonald. The court held that the grantee did not get the interests of Catherine McDonald because a deed acknowledged by a person not named in the instrument as a grantor does not transfer that person's interest.

Recording Between the parties, an unrecorded deed can convey good title. However, an unrecorded deed does not give constructive notice to the world of the grantee's interest.

Besides acknowledgment, a deed to be recorded must contain the name and address to which future tax statements are to be sent. The recorder also will require that the documentary transfer tax be paid before recording. The county tax assessor requires filing a Change of Ownership form.

Consideration While a promise to give a deed would require consideration in order to be enforceable, a deed is not a contract. It is a completed transfer, and consideration generally is not required. However, consideration is required for deeds by personal representatives (executors, guardians, attorneys-in-fact, etc.).

If a deed is given without consideration or for inadequate consideration while the grantor is insolvent, creditors of the grantor or a trustee in bankruptcy might be able to reach the property because the transfer would have constituted fraud against the creditors. While the courts ordinarily are not concerned with the adequacy of consideration, inadequate consideration would be admissible to show fraud or undue influence.

The recording of a deed given without consideration would not give the grantee priority over prior unrecorded conveyances and encumbrances for value.

The conveyance of a deed given on the promise of later consideration will remain valid, even in the event of failure to give the consideration.

Manner of taking title The deed need not indicate how title is being taken. If the grantee is a single individual, the grantee would take title in severalty. In the case of more than one grantee, it would be presumed that they are taking title as tenants in common. An exception to this is that deeds to both spouses in a marriage that do not indicate how title is to be taken pass title as community property.

Witnesses and seals In California, deeds need not be witnessed (unless they are signed with an X), nor are seals required. As for other documents, the presence of a seal on a corporate deed creates the presumption that the person signing had corporate authority.

Dated A deed need not be dated. The deed takes effect on delivery. A mistake in the date on the deed does not affect its validity. However, the date of a deed could be important in the case of a conflicting claim.

Types of Deeds

Grant deed The deed used most commonly in California to transfer title, the **grant deed**, has two implied covenants:

1. That before the time of execution of such conveyance, the grantor has not conveyed the same estate or any right, title, or interest therein to any person other than the grantee
2. That such estate is at the time of execution of the conveyance free from encumbrances done, made, or suffered by the grantor or any person claiming under the grantor (other than those declared)

If one of the grantor's implied covenants in a grant deed is breached, the grantee will be entitled to either rescission or damages.

A grant deed customarily is used along with a policy of title insurance.

Grants by grant deed are presumed to be in fee simple (Civil Code Section 1105). When a person purports to grant real property in fee simple and subsequently acquires any claim or title to the real property, the claim or title passes to the grantee or successors (Civil Code Section 1106). Grant deeds, therefore, convey **after-acquired title** as if the grant deed stated "... and all interest that I may at any time hereafter acquire." For example, suppose a grantor executes a grant deed to property the grantor thinks he inherited from a distant relative. However, the relative is still alive! When the relative later dies and the grantor inherits title, the grantee would thereby receive after-acquired title.

Figure 9.1 is a sample of a grant deed.

FIGURE 9.1: Sample Grant Deed

RECORDING REQUESTED BY AND WHEN RECORDED MAIL TO <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> Name Street Address City & State </div>	<div style="border: 1px solid black; height: 100px; margin-top: 10px;"></div> <p style="text-align: center; font-size: small;">SPACE ABOVE THIS LINE FOR RECORDER'S USE</p>
Title Order # _____ Escrow # _____ APN # _____	The undersigned grantor(s) declare(s): DOCUMENTARY TRANSFER TAX \$ _____ <input type="checkbox"/> Computed on the consideration or value of property conveyed; or <input type="checkbox"/> Computed on the consideration or value less liens or encumbrances remaining at time of sale. <input type="checkbox"/> Unincorporated area <input type="checkbox"/> City of _____
<div style="border: 1px solid black; padding: 5px; display: inline-block;"> GRANT DEED </div>	
NOTE: This form is used by agents, escrow officers and owners when any or all of a fee simple interest in real estate other than a leasehold is transferred, to identify the parties to the transfer, describe the property transferred and record the transfer with the county.	
I/We, _____, grant to _____ the real property in the City of _____, County of _____, State of California, referred to as _____	
<input type="checkbox"/> See attached Signature Page Addendum. [RPI Form 251]	
Date: _____, 20____	
_____ <small>(Print name)</small>	_____ <small>(Signature)</small>
_____ <small>(Print name)</small>	_____ <small>(Signature)</small>
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.	
STATE OF CALIFORNIA COUNTY OF _____ On _____ before me, _____ <small>(Name and title of officer)</small> personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.	
<small>(This area for official notarial seal)</small>	I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct. WITNESS my hand and official seal. Signature: _____ <small>(Signature of notary public)</small>
MAIL TAX STATEMENTS AS DIRECTED ABOVE	
<div style="border: 1px solid black; display: flex; justify-content: space-between;"> FORM 404 03-15 ©2016 RPI — Realty Publications, Inc., P.O. BOX 5707, RIVERSIDE, CA 92517 </div>	

Quitclaim deed A grantor under a **quitclaim deed** transfers only the interest that the grantor has and makes no warranties of title. If the grantor has a fee simple title, then that is the title conveyed. If the grantor has only a life estate, then only the life estate will be conveyed.

Quitclaim deeds often are used to clear title from grantors who have a possible or disputed interest.

Warranty deed Under a **warranty deed**, the grantor expressly guarantees a good title and agrees to defend the title and to be liable if the title is defective. Because of the use of title insurance in California, warranty deeds are not commonly used.

Sheriff's deed A **sheriff's deed** is given at execution of a judgment under a sheriff's sale. It transfers only the former owner's interest and contains no warranties (see Unit 10).

CASE STUDY The case of *L & B Real Estate v. Housing Authority* (2007) 149 C.A. 4th 950 involved a low-income housing project that was sold by the developer to the state but an error in draftsmanship resulted in the omission of two parcels from the legal description. The state subsequently sold the property to the county housing authority. This deed also omitted the two parcels. The county assessor continued to send tax bills to the developer. The two parcels were sold at tax sale. The buyer at the tax sale failed to make payments and L & B purchased the property at a later tax sale. The county housing authority had no notice of any tax assessments or tax sales. Property of the housing authority is exempt from property taxes.

L & B brought a quiet title action against the housing authority. The authority was granted summary judgment on the grounds that L & B's deed was void because it had constructive notice of the authority's ownership. L & B was therefore not a good-faith purchaser because the property was tax exempt.

The Court of Appeal affirmed. Because public property is exempt from real estate taxation, tax deeds that purport to convey such property are void. A prerequisite of a valid tax deed is that the property be legally subject to property tax.

Note: L & B sought to take title to a large low-income housing development based on their tax deed.

Tax deed A **tax deed** is given when property is sold by the tax collector to the public for nonpayment of taxes. After one year from date of purchase, the property is acceptable for title insurance. Because real estate taxes are a priority lien, a tax sale removes junior encumbrances.

Trust deed A trust deed is given by a borrower to a third party to hold in trust as security for a lender. It is covered in detail in Unit 10.

Trustee's deed A trustee's deed is given to the highest bidder at a nonjudicial foreclosure sale on a deed of trust (see Unit 10).

Gift deed Any deed where no valuable consideration was given is considered a **gift deed**. The deed is valid unless it was given to defraud creditors, in which case it can be voided.

Revocable transfer on death deed This deed does not affect possession or ownership while the owner is alive. If not revoked by the owner, it transfers title to the beneficiary upon the owner's death without necessity of probate.

Void and voidable deeds A void deed transfers no interest whatsoever, even if a purchaser paid value and acted in good faith. The following would make a deed void:

- Forgery
- Alteration
- The fact that the grantor is a minor
- The fact that the grantor has been declared insane or is entirely without understanding
- Failure of delivery

Voidable deeds are valid deeds unless or until they are voided. The following would allow a deed to be voided:

- Fraud
- Undue influence
- Duress or menace
- The grantor's not being of sound mind (but not declared insane or entirely without understanding)

The statute of limitations to challenge a void or voidable deed is 5 years, 20 years if the claimant is a minor or insane (Civil Code Sections 318, 319, and 328).

CASE STUDY The case of *Lee v. Lee* (2009) 175 C.A. 4th 1553 involved a deed that was altered by other than the grantee after the deed was delivered to the grantee. The alteration added two more people to the grantees. The grantors brought action to void the deed. The trial court ruled the deed was valid, and the Court of Appeal affirmed the decision.

If the deed had been altered before delivery to the grantee, it would have been void. Once delivered, it is valid, and an alteration by a third party will not invalidate it.

CASE STUDY The case of *Anderson v. Reynolds* (1984) 588 F. Supp. 814 involved a plaintiff who had befriended the defendant, an aspiring opera singer. The defendant became a trusted adviser to the plaintiff. The plaintiff wished to sell her Lake Tahoe estate, which was valued between \$1 million and \$1.6 million. The defendant told the plaintiff that several movie stars he knew, including Paul Newman, were interested in her property. The defendant convinced the plaintiff to deed the property to him so he could market the property for her as a principal. He indicated that the movie stars would not deal through agents because they wanted to avoid claims for real estate commissions. The plaintiff lost faith in the defendant, who had failed to procure a buyer, and asked for the return of her deed. The defendant gave excuses and subsequently recorded the deed. The defendant issued a trust deed to his attorney for \$375,000 for the apparent purpose of encumbering the property. Other trust deeds were given to further cloud the title. There was no evidence that anything of value was given for the trust deeds.

In an action for cancellation of the deed and revocation of the trust deeds, the court stated that the elements of fraudulent representation are

- false representation,
- knowledge or belief that the representation was false,
- intent to induce another to act or refrain from acting in reliance on the representation,
- justifiable reliance on the misrepresentation, and
- damages resulting from reliance.

The court held that the deed was induced by intentional fraud, so it should be considered null and void and of no force whatsoever and should be set aside along with the trust deeds.

Reservation in a deed A reservation in a deed gives the grantor a right that did not exist separately before the grant. For example, a grantor could reserve an easement over the property conveyed, retain a life estate, and retain oil and mineral rights, and so on.

Exception in a deed An exception withdraws part of the described property from the grant. For example, the grantor, after describing the deeded property, could except the south 20 feet from the grant. Exceptions in deeds often use the word “sans,” which means “without.”

Dedication

A **dedication** is a donation of land for public use. Because it is a donation, the donor receives no consideration.

A person cannot dedicate more than that person owns. One cotenant cannot dedicate land to public use without the consent of the other cotenants.

To obtain Subdivision Map Act approval (local control over subdivisions), subdividers might donate land for streets, bike paths, parks, schools, et cetera, in fee as well as in easement rights.

Dedication may be accomplished through a grant deed or by recording a subdivision map showing the publicly owned areas, which would be implied dedication. A deed dedicating property to a governmental body must be accepted by the governmental body.

If property is given for a particular purpose only, the dedication should state clearly that the property reverts to the grantor if the use ceases or is abandoned. Otherwise, courts likely would determine it really was given for any public purpose.

Formerly, if an owner knew that a government entity was using the owner's private property by spending public funds on improvements, clearing, or performing maintenance related to the public good for five years, an implied dedication of the property could result. In response, the state legislature enacted Civil Code Section 1009, which states that future public use of private property may not ripen into public use by implied dedication.

CASE STUDY The case of *Scher v. Burke* (2017) 3 C.A. 4th 760 held that the limitations regarding implied dedication applied to nonrecreational use as well as recreational use.

Dedication cannot be required as a condition of obtaining a building permit where the purpose of the use of the dedicated land does not relate to the new structure.

CASE STUDY The case of *Dolan v. City of Tigard* (1994) 114 S. Ct. 2309 involved a property owner who wished to redevelop a property by tearing down an existing structure and erecting a new building. The proposed development conformed to zoning. The planning commission granted the permit subject to the dedication of a 15-foot pedestrian and bike path along an adjacent creek. This dedication amounted to 10% of the property. The city claimed that the dedication would help mitigate traffic. The U.S. Supreme Court ruled that the dedication requirement violated the Fifth Amendment because it was a taking of property. The city had failed to prove that additional traffic generated by the new building had any relationship to the dedication of a bike/pedestrian path.

INVOLUNTARY TRANSFERS OF REAL PROPERTY

Besides foreclosure sales, sheriff's sales, tax sales, and property that escheats to the state (discussed later in this unit), title can be passed involuntarily—without the consent of the owner—in several ways.

Adverse Possession

A user of land can acquire title to the land of another by **adverse possession**. The rationale is that property should be used productively and taxes should be paid. Several conditions must be met:

- The possession must be an actual occupation. A person need not actually live on the property to get title by adverse possession. The person must, however, use or fence the property. Title cannot be claimed for more than what a person exercises dominion over, except when a person claims title under a defective deed. Title to all the property described in the deed could be obtained under adverse possession, even if all of the property were not used. There also must be exclusive use. If another adverse user or the owner is also in possession, an adverse user cannot gain title by adverse possession.
- A claim of occupancy can be based on the occupancy of a tenant of the person claiming the adverse interest.
- Possession must be open, notorious, and hostile to the true owner's title. If a person uses property with permission, that person will not be able to get title by adverse possession because the use is not hostile. A tenant, therefore, could not obtain title by adverse possession because the tenant would be in possession with permission.
- Use must be under a claim of right or color of title. A claim of right for adverse possession does not mean that a person believes he has title; it means only that that person claims title against others. Any hostile use would be regarded as a claim of right. **Color of title** could be a claim under a defective document—for example, a forged deed or a deed that is void because of a defect.
- Possession must be continuous and uninterrupted for a period of five years. The five-year period is satisfied if an adverse user uses the property for two years and a successor in interest to the adverse user uses the property for an additional three years (tacking on). For **tacking on**, there must be some sort of privity (mutual or successive relationship) between the two users. While the use does not have to occur every day, it must be of a continuous nature. If the use is interrupted, a new five-year period will start.
- The adverse possession claim must include a certified record from the tax collector that the adverse user has paid all property taxes for five years. If the owner continues to pay the taxes, the adverse user cannot obtain title unless the user also paid the taxes. Use based on a mistaken boundary probably would not give the adverse user title because no taxes would have been paid. However, a prescriptive easement might arise.

Title cannot be taken from a governmental entity, public utility, or railroad by adverse possession. Title also cannot be taken from a minor or an insane person. The five-year continuous use must occur when an owner is competent.

An adverse user cannot get greater rights than the true owner had. For example, the adverse possession of the surface would not include any mineral rights previously separated from the land.

A user cannot defeat future interests by obtaining an interest by adverse possession. If the true owner had a life estate, by adverse possession all the adverse user could obtain would be an estate for the life of the former life tenant.

To obtain a **marketable title**, an adverse user either would have to obtain a quitclaim deed from the title owner of record or would have to commence a quiet title action to have the court determine ownership. An adverse user who recorded a court's determination of title in the adverse user would have a marketable title.

CASE STUDY In the case of *Aguayo v. Amaro* (2013) 213 C.A. 4th 1102, the plaintiff was in the business of acquiring property by adverse possession.

When Isabel Infante died, her sons failed to commence probate. In 1999, the plaintiff put a No Trespassing sign on the property that also indicated they were the owners. They also claimed to have changed the locks and made repairs. In 2006, they recorded a quitclaim deed from Juan Duran transferring title to the plaintiff. This was a "wild document" because it was outside of the chain of title. In 2004, a quiet title action was commenced by Sofia Aguayo.

While the elements for adverse possession were present, the trial court found that Aguayo did not have clean hands, by recording a quitclaim deed from a person without any claim to title for the sole purpose of being able to get the tax bills and pay them.

The Court of Appeal affirmed.

Note: The facts indicate there could be a basis for criminal charges.

Eminent Domain

The power of the government to take private property for the public good is called **eminent domain** and is set forth in the Fifth Amendment to the U.S. Constitution, as well as the California Constitution. Eminent domain may be exercised at any level of government. It may be delegated to schools, hospitals, and public utilities.

The condemning entity must compensate the owner for the property taken. The power of eminent domain should not be confused with the exercise of police power. The exercise of **police power** to protect health, safety, morals, and general welfare generally cannot be delegated, and it does not entitle an owner to compensation. Examples of police power would be enforcement of zoning ordinances or fire, building, and health codes.

The owner is entitled to the fair market value of the property at the time it is taken. Any increase in value because of the use by the condemning entity is not considered in determining value.

An owner who is not satisfied with the compensation offered has the right to have the value determined by the court. In that event, a jury will determine market value as a question of fact. The condemnation award should be based on the highest and best use of the

property, even if the property is being used for another purpose (Code of Civil Procedure Section 1250.410).

Relocation expenses are allowed by statute in cases of eminent domain. Compensation also is allowed for goodwill of a business if the loss cannot be prevented by relocation.

Tenants are entitled to be compensated for their remaining leasehold interests unless the lease provides that it terminate upon condemnation.

CASE STUDY The case of *City of San Diego v. Sobke* (1998) 65 C.A.4th 379 involved a condemnation for street improvements. Baja-Mex Insurance and Money Exchange in San Ysidro, near the Mexican border, had to move, thus increasing operating costs. The move, which was to a less-desirable and more-costly location, coincided with a peso devaluation that resulted in Baja-Mex showing an increase in monthly earnings of 400%.

Baja-Mex sought a condemnation award for loss of goodwill. In affirming the trial court decision, the Court of Appeal pointed out that while tenants are entitled to goodwill damages in cases of eminent domain, the damages must be proven by a change in pre-taking and post-taking positions. Increased expenses was not the proper measurement of lost goodwill.

Note: With business up 400%, Baja-Mex had an impossible task to prove a loss of goodwill resulting from relocation.

Every taking of property in fee or a lesser interest (easement) means that an owner is entitled to compensation for the value of the property or interest taken. The taking for a street or a utility easement could result in a benefit to the remaining property, so that the owner would not be entitled to compensation for any detriment caused to the balance of the parcel.

Even if a property is not used for the purpose for which it was taken under eminent domain, the former owner has no right to reclaim the property.

Proposition 99 (Homeowner and Private Property Protection Act) prohibits the taking of an owner-occupied residence by eminent domain when the intention is to turn the property over to a private party rather than take it for public use.

Private parties can obtain an easement for utility services over the land of others by eminent domain, provided

- there is a great necessity for the easement,
- the easement location provides the most reasonable service and is consistent with the least damage to the burdened property, and
- the hardship of the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property (Civil Code Section 1001(c)).

Inverse condemnation If an owner is unable to use the property as a result of public action, an action could be brought for **inverse condemnation** to force condemnation proceedings. For example, if the construction of a new airport caused jets to pass 500 feet over the roof of a house, the noise might destroy the owner's peaceful use of the premises, and an action for inverse condemnation would be proper.

If a public entity delays for more than six months in commencing eminent domain after announcing it will take the property, an owner can bring an action for inverse condemnation (Code of Civil Procedure Section 1245.260).

CASE STUDY In the case of *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 C.A. 4th 507, it was alleged that trees on city property grew to the point where they partially blocked billboards from the view of motorists, thus decreasing their value. This lawsuit was for inverse condemnation. The city offered to remove one tree and pay \$1,000 in damages, but Regency refused.

The trial court denied any damages and ordered Regency to pay the city's \$99,145.64 expert witness fees.

On appeal, the trial court decision was affirmed, ruling that roadside businesses do not have a right to be seen. Impairment of commercial visibility from the road is not compensable.

CASE STUDY The case of *Dina v. People ex rel Dept. of Transp.* (2007) 151 C.A. 4th 1029 involved homeowners in the City of La Verne who sued the Department of Transportation for inverse condemnation, nuisance, and negligence, alleging that an adjacent I-210 freeway extension caused physical damage to their homes by compromising structural integrity and causing subsurface erosion that resulted in cracks in patio and garage floors. They also alleged damage from noise and dust.

The trial court dismissed the action because the homeowners failed to demonstrate that the property suffered peculiar and substantial damages or that the freeway construction or operation was unreasonable.

The Court of Appeal affirmed, noting that the homeowners failed to demonstrate that their property suffered a direct substantial or peculiar burden from the freeway. The homeowners failed to produce any causal connection between the cracking and construction or maintenance of the freeway. The nuisance claim was barred because CC3482 provides that nothing done or maintained under express authority of statute can be deemed a nuisance. The court also noted that there is no authority for the proposition that noise and dust emanating from the freeway constituted a dangerous condition.

Note: For this suit to have been successful, the homeowners would have had to show a relationship of construction and maintenance with their physical damage, and/or that the construction or maintenance placed a particular dangerous burden on the homeowners.

Severance damage If the taking of property results in a lower value to the remaining property that has not been taken, the owner will be entitled to severance damage (Code of Civil Procedure Section 1240.150).

CASE STUDY *Gilbert v. State* (1990) 218 C.A.3d 234 involved a moratorium on new water connections because of a water shortage. The owners of the property alleged inverse condemnation. The court held that California law does not recognize potential water use as a compensable property right. While the court indicated that a regulation effects a taking if it does not substantially advance legitimate state interests, in this case, the conditions imposed were in the state's interest in ensuring a potable water supply. Further, because the land was purchased without a water supply, the state did nothing to diminish the value of the land.

Government Seizure

The government can seize property without compensation to the owners when the property was used with the owner's knowledge for unlawful acts, such as the sale, manufacture, or distribution of controlled substances, or was purchased with revenue derived from drug traffic.

The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) provides for the forfeiture to the United States of any real or personal property derived from proceeds traceable to violation of 18 U.S. Code Section 1014, which prohibits "knowingly making any false statement... for the purpose of influencing in any way the action of... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation upon any application for a loan." Falsifying a loan application could, therefore, result in the forfeiture of the property securing the loan.

CASE STUDY The case of *U.S. v. 3814 N.W. Thurman St.* (1999) 164 F.3d 1191 involved a fraudulent loan application. Three-year income was shown as \$308,106, when it was actually \$27,286, and \$108,356 in outstanding liabilities was not disclosed. Based on the false loan application, the U.S. government filed an action in rem (against the property) in a forfeiture action for knowingly making false statements to a federally insured financial institution. The district court granted judgment in favor of the government and ordered the property forfeited. The trial court refused to consider whether the forfeiture was excessive under the Eighth Amendment to the U.S. Constitution.

The Ninth Circuit Court of Appeals reversed, ruling that forfeiture was an excessive fine because there was no loss to the bank and the owner had not been involved in other criminal activity. If this were a criminal case, the penalty would have been six months' imprisonment and a fine of \$500 to \$5,000. The court held that forfeiture of 40 times the maximum fine violates the excessive fines clause of the Eighth Amendment.

The Fourth Amendment protects property owners against seizure without a notice and hearing.

CASE STUDY The case of *U.S. v. James Daniel Good* (1993) 114 S. Ct. 492 involved a drug seizure in which a quantity of marijuana was found in a home. Good pleaded guilty to a state drug offense. In an ex parte proceeding (without the defendant being present), the federal magistrate ordered the immediate seizure of the property. The tenants who were in possession were ordered to pay their rent to the government rather than to Good.

The Ninth Circuit Court of Appeals held that the civil seizure without prior notice or hearing violated the Fifth Amendment's due process clause. The U.S. Supreme Court agreed that the property interests of Good were protected by the Fifth Amendment. The Fourth Amendment also protected Good against wrongful search and seizure. While seizure could be justified to protect evidence and prevent it from being moved, this was not the situation, because real property is not movable. A lis pendens notice would have served to protect government interests. The court held that absent a pressing reason, seizure requires a notice and a hearing.

TRANSFERS OF REAL PROPERTY UPON DEATH

Upon an owner's death, the owner's property can be transferred voluntarily to the heirs—by will—or involuntarily by the laws of intestate succession to relatives, or by escheat to the state.

Testate Succession

A **will** is a testamentary declaration about the disposition of a person's property, to take effect upon the maker's death. A will is said to be an *ambulatory instrument* because it can be changed anytime before the maker's death. The maker of a will is a testator (*trix*, formerly added as a suffix to designate a woman, is not used in this course). Anyone 18 or older and of sound mind may make a will. The testator must understand the nature of the testator's property and the disposition of the property.

A later **valid will** that makes a complete disposition of the property of the testator in a manner different from an earlier will serves to completely revoke the earlier will.

A **codicil**, an amendment to a will, requires the same formalities as a will.

A **devise** is a transfer of real property by will. A *bequest* is a transfer of personal property. *Legacy* refers to money.

Types of Wills

Formal will A **formal will** must be signed in the presence of at least two witnesses who, at the maker's request, attest to the testator's declared will. Beneficiaries under the will may not be witnesses. While a formal will need not be dated, an undated will could create a problem when more than one will is found because the dated will is presumed to be the latest in time.

Holographic will (Probate Code Section 6111) A **holographic will** is handwritten by the testator. For such a will to be valid, the material provisions must be in the handwriting of the testator, and it must be signed by the testator, but neither witnesses nor a date are required. A letter could meet the requirements of a valid holographic will if it were handwritten with testamentary intent.

Nuncupative will Oral, or nuncupative, wills are no longer valid in California.

Ademption

Disposition of property before a person's death revokes the portion of the will giving that property to a named beneficiary (i.e., **ademption**). For example, if a man's will gave a specific property to his cousin, but he sold that property before his death, the devise to the cousin would be revoked. The proceeds from the sale would go to residual beneficiaries and not to the cousin.

Simultaneous Death

When spouses die in a common disaster, **simultaneous death**, and there is insufficient evidence to conclude that one spouse survived the other, the estate of each spouse will be distributed as though each had survived the other (Uniform Simultaneous Death Act, California Probate Code Sections 220–230). For this reason, joint tenant property owners should each have wills.

Intestate Succession

When a deceased leaves no will, the property passes to the deceased's heirs by the law of **intestate succession**.

Figure 9.2 will aid in the understanding of intestate succession.

Escheat If a person dies intestate and that person's representative is unable to locate an heir within two years after death, the attorney general will bring an action to declare title to be vested in the state. If heirs fail to come forward within five years after the person's death, the property will **escheat** to the state (Probate Code Sections 220–231), and it can then be sold.

Probate

Probate is the legal procedure that provides for the transfer of the real and personal property of the deceased, as well as the payment of the debts of the deceased.

The person appointed under the will to serve as the personal representative of the deceased during probate is commonly referred to as the **executor**.

If the deceased died intestate (without a will), the court will appoint a personal representative (commonly referred to as an **administrator**) to represent the deceased.

Upon a person's death, the person's property becomes immediately vested in the beneficiaries named in the will or the heirs if there is no will. Theoretically, they immediately could encumber or transfer their interests; however, title would not be insurable because the property would be subject to the control of the deceased's representative until probate was concluded. Heirs and beneficiaries often will transfer their interests for consideration before completion of probate. Some people are in the business of buying the interests of heirs and beneficiaries.

Real property is probated in the state where the property is located. Probates in the state where the deceased resided are domiciliary probates. Probates in other states are ancillary probates. In California, estates are probated in superior court in the county where the real property is located or the deceased resided.

Probate starts with a petition for probate (if a will) or letters of administration (if intestate). A hearing is held, and a representative is appointed or confirmed. Creditors generally have four months from publication of notice to file their claims. An inventory and appraisal are filed with the court clerk. The representative files an accounting of all receipts and disbursements and requests court approval. Finally, the representative petitions the court to distribute the remaining assets to the proper heirs and devisees.

If a deceased had a pending contract for the sale of real property, the court would have to confirm the sale.

When it is in the best interests of the estate, property may be sold in probate. Money may be needed to pay debts, taxes, costs, or simply to allow the division of assets among heirs or beneficiaries.

FIGURE 9.2: Intestate Succession

CALIFORNIA LAW OF INTESTATE SUCCESSION

Community Property

If there is a surviving spouse:

- One-half already belongs to surviving spouse
- Remaining one-half goes to surviving spouse after decedent's liabilities have been paid

Community Property With Right of Survivorship

If there is a surviving spouse, surviving spouse takes entire property

Separate Property

If there is a surviving spouse and no child:

- Surviving spouse takes one-half
- Surviving parent, brother or sister; or child of deceased brother or sister; or (if none of these) spouse takes one-half

If there is a surviving spouse and one child:

- Surviving spouse takes one-half
- Child takes one-half

If there is a surviving spouse and more than one child:

- Surviving spouse takes one-third
- Children divide two-thirds equally

If there is no surviving spouse or child:

- Property is distributed to next of kin in order prescribed by California law; if no heirs can be located, the property will escheat to the state
-

The representative of the estate can grant an exclusive listing for a period not to exceed 90 days. Generally, sales by the representative of the deceased are subject to court approval.

Bids usually would be taken to the court for an approval hearing. Late bids from other parties will be considered. However, for a late bid to be considered, it must be at least 10% higher on the first \$10,000, and 5% higher on the balance of the bid being considered.

For example, if the bid being considered were for \$90,000, a late bid would have to be \$5,000 higher:

10% of	\$10,000 =	\$1,000
5% of	<u>\$80,000</u> =	<u>\$4,000</u>
	\$90,000	\$5,000

(An easy way to remember this formula is 5% plus \$500.)

The court can set increments for further bids and then confirm the sale.

The Probate Code requires completion of the probate sale for the broker to earn a commission.

CASE STUDY At a confirmation hearing on an estate sale, the person who made the successful overbid listed broker Henry Tong as the person entitled to a real estate commission.

Tong's license had expired at the time of the purchase, although it was subsequently renewed. The superior court held that Tong was not entitled to a commission because he was not licensed at the time the cause of action arose (the time of the bid).

The Court of Appeal reversed because the Probate Code states that an estate is not liable for a commission unless the sale is consummated. While the general rule is that a broker is entitled to a commission when an offer from a ready, willing, and able buyer is accepted by the property owner, that rule is superseded by Probate Code Section 10160, which requires completion of the probate sale for the broker to earn a commission. Because Tong was licensed when the commission was earned (the sale was completed), Tong was entitled to his commission (*Estate of Lopez* (1992) 8 C.A.4th 317).

Probate sales are one of the few instances where commissions are subject to court review. When the probate court confirms the bid and there is no overbid in court, the listing agent receives all the sales commission. When there is no listing, but a real estate agent procures an acceptable offer that is confirmed by the probate court, the agent receives all the sales commission (the rate is set by the court).

If there is no agent on the original offer and there is an agent for the late bid, the agent's commission cannot exceed 50% of the difference between the original offer and the accepted offer.

If an agent procures a bid that is overbid in probate court by a buyer represented by an agent, the two agents split the commission on the original amount, and the agent who obtains the overbid receives all the commission on the overbid amount, but is limited to 50% of the increased bid, with the court determining the commission rate.

If the original offer was made through the listing agent and the overbid is made by a buyer not represented by an agent, the listing broker earns a commission on the amount of the original bid, with the court determining the commission rate.

The **Independent Administration of Estates Act** allows a private sale of property in probate without a court proceeding allowing later bids. The heirs must agree to this procedure, and court approval is required.

Living Trusts

A living trust may be used in addition to a will. Under the living trust, the trustor(s) generally transfer their property to themselves as trustees for the beneficiaries, who are usually the same people. The living trust, which is a revocable trust, avoids probate because the trustors have already conveyed their property to the trust. The trust provides for the division of the property after the death of the last trustor. The successor trustee makes the conveyance, thus avoiding probate costs and delays.

Other Methods of Transfer

By holding property in joint tenancy, property is automatically transferred to the surviving joint tenant(s) upon death of one joint tenant, thus avoiding probate.

A revocable transfer on a death deed can also be used to avoid probate. The property is deeded to a beneficiary, but it can be revoked during the owner's lifetime. The ownership is not effected until death and, if not revoked, transfers title to the beneficiary.

SUMMARY

Title can be transferred by both voluntary and involuntary conveyances. The most common way is by deed.

Deed requirements include

- writing (because of the statute of frauds),
- execution,
- description of the property,
- delivery,
- acceptance,
- granting clause,
- competent grantor, and
- definite grantee.

The following are *not* required for a valid deed:

- Acknowledgment (although a deed must be acknowledged to be recorded)
- Recording (although an unrecorded deed does not give constructive notice to later purchasers for value)
- Consideration (a valid deed can be given for love and affection)
- Manner of taking title (if not specified, conveyances to spouses transfer title as community property, conveyances to two or more parties who are not spouses transfer title as tenants in common, conveyances to one party transfer title in severalty)
- Witnesses and seals
- Date (deed takes effect on date of delivery)

The types of deeds include the

- grant deed, in which the grantor implies that the grantor previously has not conveyed the property and has not encumbered the property other than what has been disclosed; grant deeds convey after-acquired title;
- quitclaim deed, which conveys whatever interest the grantor has but makes no warranty of title;
- warranty deed, through which the grantor expressly warrants that the grantor has good title and agrees to defend the title and be liable should it be defective (not used in California);
- sheriff's deed, which is given after a sheriff's sale and transfers only the interest a former owner had;
- tax deed, which is given when property is sold for nonpayment of taxes (because taxes are a priority lien, the sale wipes out junior encumbrances); and
- gift deed, given for love and affection.

Dedication is the voluntary transfer of real property through donation for public use.

Involuntary transfers include

- adverse possession, through which a user can acquire title by open, notorious, hostile, adverse occupation for a period of five years, as well as paying the taxes during that period; and
- eminent domain, through which the government can take property for the public good but must pay the former owner the fair market value of the property taken.

A will is a testamentary declaration to dispose of the property of a deceased. A formal will requires the signature of the testator and two witnesses. A holographic will, a handwritten will signed by the testator, also is valid in California, but a nuncupative (oral) will is not.

If a person dies intestate with no heirs, the person's property is transferred involuntarily to the state by escheat.

Probate is the legal procedure to carry out the wishes of the deceased and pay the debts.

DISCUSSION CASES

1. Under what circumstances can life tenants transfer their interests by will?
2. Grantors conveyed title to grantees, retaining a life estate in a portion of the property conveyed. The description of the portion reserved was ambiguous. **What are the rights of the grantors?**

Lehman v. Kamp (1969) 273 C.A.2d 701

3. A cotenant conveyed the entire fee title. Subsequently, the cotenant acquired the interest of his cotenant. **What are the rights of the parties?**

Emeric v. Alvarado (1891) 90 C. 444

4. A deed was given to a grantee with the request that it not be recorded until the grantor died. **Is this a valid transfer?**

McCarthy v. Security Trust & Savings Bank (1922) 188 C. 229

5. After a deed was delivered, it was placed in the grantor's deposit box. The grantor continued to collect the rents and pay expenses on the property. **Did a valid transfer occur?**

Huth v. Katz (1947) 30 C.2d 605

6. The federal government took all the land bordering a lake by eminent domain. Condemnees had three cabin barges on the lake that were used in their business. The cost of moving the barges would have been excessive. The government refused to pay for the barges because they were personal property. **Are the condemnees entitled to the value of the barges?**

U.S. v. 967.905 acres of land (1969) 305 F. Supp. 83

7. The United States condemned three summer camps. The camps, owned by nonprofit organizations, had a fair market value of less than \$1 million, but the replacement cost was approximately \$6 million. **What are the owners entitled to?**

U.S. v. 564 acres of land (1979) 99 S. Ct. 1854

8. Muller owned property that he rented to his veterinary corporation. The state condemned the building. Muller built another building in the same area, which he also rented to his corporation. Because of higher costs, Muller charged the corporation a higher rent. Because of the higher rent, the corporation suffered a decrease in profits. **Is the corporation entitled to compensation for this loss?**

People ex rel. Dept. of Transportation v. Muller (1984) 36 C.3d 263

9. A deed was placed in escrow for one-half of a lot. The evidence was conclusive that the deed later was altered to convey the entire lot. **Are the sellers entitled to the value of the property they did not intend to convey?**

Montgomery v. Bank of America (1948) 85 C.A.2d 559

10. A redevelopment agency acquired a junkyard by eminent domain. The owner was unable to relocate her business. She was forced to sell her inventory as scrap for far less than its value for parts. **Is this a compensable loss?**

Baldwin Park Redev. Agency v. Irving (1984) 156 C.A.3d 428

11. A foreclosure was imminent, and one joint tenant signed the name of the other joint tenant on a deed because the other joint tenant was not available. **Was the transfer valid?**

Handy v. Shiells (1987) 190 C.A.3d 512

12. When the Johnsons were purchasing their home, their son suggested he be the purchaser so they could take advantage of his GI financing. The parents supplied the down payment and treated the home as their own. Upon the father's death, the son asked his widowed mother to leave so he could sell his house. **Is the son's action proper?**

Johnson v. Johnson (1987) 192 C.A.3d 551

13. A decedent's will left a valuable piece of property to you. However, before her death, she sold the property. The sale did not close until three days after her death. Both you and the residual beneficiary claim the sale proceeds. **What are your rights?**

Estate of Worthy (1988) 205 C.A.3d 760

14. A dedication of property was made to the City of Palm Springs for specific use as a library. The city wished to convey a portion of the property to a developer for access to a proposed neighboring commercial development. The conveyance would require that a portion of the library be demolished. **Was the proposed conveyance to the developer proper?**

Save the Welwood Murray Memorial Library Comm. v. City Council (1989) 215 C.A.3d 1003

15. Co-owner 1 sued co-owner 2 for sole ownership based on adverse possession. **Assuming co-owner 1 had the exclusive occupancy, should homeowner 1 prevail?**

Hacienda Ranch Homes Inc. v. Superior Court (2011), 198 C.A. 4th 1122

16. A property owner sought title to a portion of a neighbor's property. The plaintiff met all the requirements of adverse possession, except paying taxes. Because the neighboring property was a religious institution, taxes were not assessed. The plaintiff contended that if taxes were not assessed, they need not be paid. **Do you agree?**

Hagman v. Meyer Mount Corporation (2013) 215 C.A. 4th 82

17. A developer wished to develop a shopping center. Indio approved with the contingency that about one-third of the property be undeveloped because it would be needed for a freeway interchange and that the city anticipated negotiating to buy or take the property by eminent domain at a later date. Due to lack of funding, the city could not buy the land at that time. The plaintiff sued as it was an indefinite taking of one-third of the property without compensation. **Was the action of the city within its authority?**

Jefferson Street Ventures, LLC v. City of Indio (2015) 236 C.A. 4th 175

UNIT QUIZ

1. After a deed was signed by the grantor, the grantee made a slight unauthorized alteration that increased the size of the property conveyed from 600 acres to 620 acres. The effect of this modification was that
 - a. the entire deed became void.
 - b. only 600 acres would be transferred because the alteration cannot pass title.
 - c. 620 acres were transferred, but the grantee could be liable for damages.
 - d. the grantor has one year to discover the forgery and void the transfer.
2. Title transfers with a deed at the time of
 - a. delivery.
 - b. signing.
 - c. acknowledgment.
 - d. recording.
3. The MOST important factor in the delivery of a deed is
 - a. the intent of the grantor.
 - b. physical conveyance.
 - c. possession.
 - d. recording.
4. After a man's death, a deed giving his home to a nephew is discovered in the same envelope as his will. The will, dated before the deed, gave the house to his church. Who gets the house?
 - a. The church, because the will was dated before the deed
 - b. The church, because the deed was never delivered
 - c. The nephew, because the deed was dated later and thus modified the will
 - d. The nephew, because deeds have priority over wills
5. Which deeds would fail to transfer title?
 - a. A deed to John Jones using his stage name "Mr. Marvelous"
 - b. A deed made to Henry Schmidt and wife
 - c. A deed made to Henry or Henrietta Schmidt
 - d. A deed to Tom Brown, an emancipated minor
6. Acknowledgment is necessary to
 - a. deliver a deed.
 - b. validate a deed for recording.
 - c. have a formal will.
 - d. convey legal title.

7. Which is(are) characteristic(s) of a recorded deed?
 - a. It must be acknowledged.
 - b. It is presumed to have been delivered.
 - c. It provides constructive knowledge of the transfer.
 - d. All of these are characteristics of a recorded deed.
8. Which is a requirement of every valid deed?
 - a. Acknowledgment
 - b. Dated
 - c. Witnesses
 - d. None of these
9. Which is a characteristic of a quitclaim deed?
 - a. It conveys after-acquired interests.
 - b. It can convey a partial interest.
 - c. It warrants that the grantor has not previously conveyed the property.
 - d. It warrants that there is nothing against the property that the grantor knows about that has not been disclosed.
10. What type of deed is received by a purchaser after a sheriff's sale?
 - a. Limited warranty deed
 - b. Quitclaim deed
 - c. Sheriff's deed
 - d. Grant deed
11. When you receive and record a gift deed, which could adversely affect your title?
 - a. Creditors of the grantor
 - b. Rights of parties in possession
 - c. Prior unrecorded deeds given for valuable consideration
 - d. All of these
12. A grantor retained an easement over conveyed land. What is this called?
 - a. A reservation
 - b. An exception
 - c. A codicil
 - d. An after-acquired interest
13. In obtaining title by adverse possession, it is *NOT* necessary to
 - a. live on the property.
 - b. actually pay taxes.
 - c. have open and notorious occupation.
 - d. have occupation that is hostile to the interests of the owner.

14. *Tacking on* refers to
 - a. an additional party to an agreement.
 - b. additionally acquired security.
 - c. adverse use of a previous or subsequent user.
 - d. none of these.
15. Able's property was taken by the city for a new civic center. Baker was Able's tenant in the property and had five years remaining on an advantageous lease. Which statement is *TRUE* of Baker's rights?
 - a. Baker's only right is to 30-day notification.
 - b. Baker has rights against Able for the value of his lease interest.
 - c. Baker has rights against the city for the value of his lease interest.
 - d. Both b and c are true of Baker's rights.
16. Loss of value of remaining land caused by a taking under eminent domain is known as
 - a. inverse condemnation.
 - b. the police power of the state.
 - c. severance damage.
 - d. exemplary damage.
17. An owner's property was seized because it was used for drug sales. Which statement is correct?
 - a. The owner is entitled to the fair market value of the property.
 - b. If the owner is not found guilty of a felony, the property must be returned.
 - c. Innocence of any knowledge of the use would be a defense against seizure.
 - d. None of these statements is correct.
18. A codicil providing for transfer of real property is a(n)
 - a. type of deed.
 - b. amendment to a deed.
 - c. original government transfer.
 - d. amendment to a will.
19. Alex's inheritance of a house from his uncle George would be called a
 - a. bequest.
 - b. devise.
 - c. legacy.
 - d. dedication.

20. Which is a requirement of a holographic will?
 - a. Verbal disposition
 - b. Handwritten
 - c. Witnessed
 - d. Dated

21. Agnes sold her house and purchased stocks and bonds with the proceeds. Upon her death, a will was found giving her house to her best friend, Mildred. What is Mildred entitled to?
 - a. The stocks and bonds
 - b. The value of the house at the time Agnes died
 - c. The price Agnes received for the house
 - d. Nothing

22. Alice and Jack, a married couple, hold all their property as community property. When Alice dies intestate, each of the couple's five children will receive
 - a. one-fifth of her property.
 - b. one-fifth of two-thirds of her property.
 - c. one-tenth of her property.
 - d. nothing.

23. A woman died intestate, leaving one living son and two grandchildren (by a deceased daughter) as her only living relatives. The disposition of her property would be
 - a. one-half to her son and one-quarter to each of the grandchildren.
 - b. one-third to her son and one-third to each grandchild.
 - c. to the state by escheat.
 - d. none of these.

24. A will provided that all of an unmarried testator's estate would go to his only child. His child predeceased the testator, but the child left a spouse and three children. The estate would
 - a. escheat to the state.
 - b. pass one-third to the spouse and two-thirds to the grandchildren.
 - c. pass one-half to the spouse and one-half to the grandchildren.
 - d. pass one-third to each of the grandchildren.

25. The executor brought a bid of \$190,000 to the probate court for approval. The court will NOT consider late bids less than
 - a. \$190,001.
 - b. \$191,000.
 - c. \$200,000.
 - d. \$209,000.

10

UNIT TEN



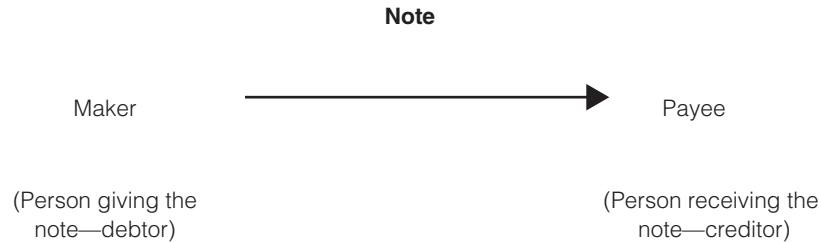
REAL PROPERTY SECURITY DEVICES

KEY TERMS

annual percentage yield (APY)	Dodd-Frank Act	or more clause
antimerger clause	dragnet clause	partially amortized note
assignment of rent	due-on-sale clause	predatory lending
bait-and-switch advertising	Equal Credit Opportunity Act	promissory note
balloon payment	Fair Credit Reporting Act	Real Estate Settlement Procedures Act
beneficiary statement	fictitious trust deed	real property sales contract
blanket encumbrance	financing statement	rent skimming
California Homeowners Bill of Rights	Garn Act	request for notice of default
California Housing Financial Discrimination Act of 1977	holder in due course	right of redemption
certificate of sale	hypothecate	security agreement
controlled business arrangement	Loan Estimate	Servicemembers Civil Relief Act
Covered Loan Act	lock-in clause	subject to
defeasance clause	mortgage	trust deed
deficiency judgment	Mortgage Forgiveness Debt Relief Act	Truth in Lending Act
	negotiable instruments	Truth in Savings Act
	notice of delinquency	wraparound loan
	obligatory advances	

PROMISSORY NOTES

A **promissory note** is the evidence of the debt. It is an unconditional written promise signed by the maker to pay a certain sum in money now or at a specific time in the future.



Classification of Promissory Notes

Straight note A straight note is an interest-only payment note with the principal to be paid in full when due. The advantage to the borrower is a lower payment than what would be required with an amortized note.

Installment note An installment note provides for regular payments of principal and interest.

Amortized note The regular payments for a fully amortized installment loan pay off the entire principal, as well as the interest during the loan term. A **partially amortized note** would have payments based on an amortization schedule, but it would have to be paid in full at a date before the end of the amortization schedule (balloon payment).

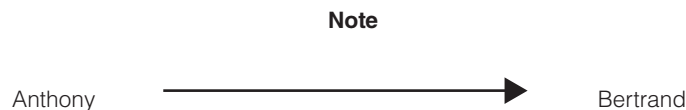
Negotiable Instruments

While not money, **negotiable instruments** are freely transferable and are used in lieu of money. They are either promises to pay (notes) or orders to another to pay (drafts).

To be a negotiable instrument, a note or draft must be

- in writing,
- signed by the maker,
- an unconditional promise or order to pay another, and
- payable on demand or at a specific time in the future, for a certain sum in money, and payable to the order of the payee or to the bearer.

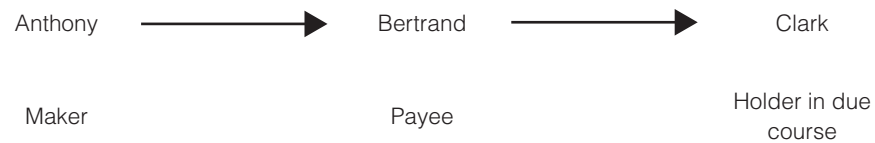
Whether an instrument is negotiable is of great importance to holders. Assume Anthony gave a note to Bertrand:



Anthony could have valid personal defenses against paying Bertrand. These defenses could include

- lack of consideration for the promise,
- fraud on the part of Bertrand,
- prior payment or cancellation,
- setoffs from other claims Anthony has against Bertrand, or
- the fact that the note was never delivered to the payee.

Holder in due course If the note was negotiable, Anthony could not raise these personal defenses against a transferee (Clark) from Bertrand who was a **holder in due course**, often called a *BFP*—bona fide purchaser:



For a party to be a holder in due course,

- the instrument must be proper and complete on its face,
- the holder must have acquired the instrument before its due date without any notice as to previous dishonor,
- the transferee must have been a good-faith purchaser for value, and
- the transferee must have had no notice of any defenses of the maker or any defects in the title of the transferor of the paper.

Assume that the maker (Anthony) had already paid the payee (Bertrand) but had failed to get back the note. While Anthony would have a valid defense against any efforts by Bertrand to collect again on the note, Anthony could not use the prior payment defense against Clark, a transferee from Bertrand, who is a holder in due course. Because a holder in due course is not subject to the personal defenses of the maker, the holder in due course has greater rights than the payee (Bertrand).

Some defenses are valid against even a holder in due course. These are known as *real defenses* and include

- incapacity—the maker lacked legal or mental capacity;
- illegality—the note was executed for an illegal purpose;
- forgery; and
- material alteration by the holder. (If the note were raised by a prior holder, a holder in due course could collect on the original terms.)

CASE STUDY The case of *Wilson v. Steele* (1989) 211 C.A.3d 1053 involved a note secured by a trust deed that was given by a homeowner for remodeling work performed by an unlicensed contractor. The assignee of the note claimed to be protected as a holder in due course. Business and Professions Code Section 7031 requires contractors to be licensed. The Court of Appeal held that because the contractor was not licensed, the contract was illegal and unenforceable. Commercial Code Section 3305 (2)(b) provides that a holder in due course takes free from defenses, but one of the exceptions is illegality of the transaction, which renders the obligation a nullity.

Common Provisions of Notes

Balloon payments Often, installment notes provide that the entire balance will be due at a date before the note's being fully amortized. Such notes are called *partially amortized notes*, and the large payment is known as a *balloon payment*. A balloon payment is described as a payment more than twice the amount of the smallest payment (Business and Professions Code Section 10244).

Balloon payments are limited for regulated loans made or arranged by loan brokers. These restrictions do not apply to first trust deeds of \$30,000 or more, or to second trust deeds of \$20,000 or more (Business and Professions Code Section 10245), nor do they apply to construction loans or notes given by the buyer to the seller to finance the purchaser or to loans made by institutional investors.

A loan with a term of less than three years for non-owner-occupied property may not have a balloon payment. A loan with a term under six years on an owner-occupied dwelling of fewer than three units may not have a balloon payment.

The holder of a balloon note secured by an owner-occupied dwelling of four or fewer units must give from 90 to 150 days' warning of the due date of the balloon payment. Construction loans and loans where seller financial disclosures have been made are exempt from the notification requirement.

Due-on-sale clause Also known as an *alienation clause*, the **due-on-sale clause** calls for the note to be paid in full upon sale of the property. (It accelerates the payments.)

Loans with due-on-sale clauses cannot be assumed. A number of state courts determined that loans made by private individuals and state-licensed lenders were assumable loans despite the language in the notes. In California, in *Wellenkamp v. Bank of America* (1978) 21 C.3d 943, the court determined that an institutional lender could not automatically enforce a due-on-sale clause unless the sale increased the risk of default or impaired the lender's security. Based on California decisions, a huge number of loans with due-on-sale clauses were assumed.

Decisions in California and other states seemed to indicate that all loans were assumable (including those made by federally chartered lenders) unless the assumption impaired the lender's security or otherwise increased the lender's risk.

In 1982, the U.S. Supreme Court, in *Fidelity Federal Savings & Loan v. de la Cuesta* (1982) 458 U.S. 141, determined that due-on-sale clauses were fully enforceable by federally licensed lenders.

After the *de la Cuesta* decision, savings associations chartered by states were requesting federal charters to be able to enforce their due-on-sale clauses. Congress then passed the **Garn Act** (Garn–St. Germain Depository Institution Act). The act allowed lenders to enforce due-on-sale clauses unless the loan was made or assumed under state law that allowed loan assumptions at that time. Such loans remained assumable until October 15, 1985 (a three-year window period for assumptions). The due-on-sale full enforcement by federally chartered lenders was not affected by the act.

Because due-on-sale clauses are now considered fully enforceable by lenders, a number of methods have been devised to get around the assumption prohibitions. They are at best of questionable legality and at worst could subject the property owner and broker to criminal liability for fraud against a lender. These methods include

- long-term unrecorded lease options,
- unrecorded land contracts, and
- land trusts.

Not all transfers trigger the due-on-sale provision of notes. Exceptions include transfers resulting from the death of one of the coborrowers or from the dissolution of a marriage, as well as transfers resulting from the foreclosure of a junior lien. A lender knowing of a transfer and failing to act might waive its rights to enforce the due-on-sale clause.

CASE STUDY In *Rubin v. Los Angeles Federal Savings and Loan et al.* (1984) 159 C.A.3d 292, the Court of Appeal refused to allow enforcement of the due-on-sale clause because the lender knew of the transfer for four years before it demanded the full payment. The court stated that “although waiver is frequently said to be the intentional relinquishment of a known right, waiver may also result from ‘conduct’ which according to its natural import is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such a right has been relinquished...”

Due-on-encumbrance clause The due-on-encumbrance clause accelerates the payments on a loan if the owner places a further encumbrance on the property. Civil Code Section 2949, however, prohibits such acceleration for single-family owner-occupied dwellings. For other than a single-family dwelling, a lender can accelerate payments only if the encumbrance endangers the lender’s security. (This would be a very unusual situation.)

Acceleration upon default Even when a note states that all payments on the note become due upon default, a borrower can cure a debt that becomes accelerated because of default of payment on principal, interest, taxes, or insurance by paying the amount in arrears plus costs up to five days before sale under a trust deed power-of-sale foreclosure, or at any time before entry of a decree on a mortgage foreclosure by court action. Trustee or attorney fees are limited by statute.

Late charges Late charges for a single-family dwelling loan made after January 1, 1976, cannot exceed 10% of the installment due; however, a \$5 minimum late charge is allowed. No late charge is allowed for payments less than 10 days late (Business and Professions Code Section 10242.5).

Prepayment penalties The justification for prepayment penalties is that prepayment means an interest loss for the lender until the money has been placed in a new loan, as well as the expense of placing a new loan.

The prepayment fee must be reasonable, based on when the loan was made. An unreasonably high prepayment penalty could be considered an unreasonable restraint on alienation and would not be collectible.

Prepayment penalties are not allowed on FHA-insured or VA-guaranteed loans.

On real property contract sales (land contracts) of one to four residential units, the buyer has the right to prepay; however, the lender can prohibit prepayment for 12 months after the purchase.

A clause that provides for payments of a specified amount “or more” allows prepayment without penalty.

The absence of any provision allowing prepayment would have the effect of being a **lock-in clause**, locking the borrower in to the full interest for the term of the loan even if the loan is prepaid. To avoid this harsh effect, prepayment is allowed by statute on one to four residential units.

Loans on one to four residential units that were not negotiated by a real estate broker can be prepaid at any time, but prepayment penalties can be assessed for only five years. Twenty percent of the loan can be prepaid in any 12-month period without penalty. Prepayment penalties can be for only the amount prepaid in excess of 20% of the original loan amount, and the penalty cannot exceed six months’ advance interest on that amount (Civil Code Section 2954.9).

When the loan is for other than one to four residential units, a prepayment fee can be collected only if the borrower expressly waived the right to prepay or agreed in writing to a penalty for prepayment. The borrower must sign this waiver separately.

If the lender does not elect to accelerate the loan upon sale, but the buyer wanted to prepay, a prepayment penalty would appear to be proper (even for one to four residential units), because the lender has not accelerated the payments.

A lender may not collect a prepayment penalty when the lender accelerates the payments upon default for one to four residential units (Civil Code Section 2954.10).

Business and Professions Code Section 10242.6 and Civil Code Section 2954.9 prohibit prepayment penalties for residences that have been damaged by a natural disaster for which the governor has declared a state of emergency and that cannot be occupied when the prepayment is causally related to the disaster.

For loans negotiated by a real estate broker on single-family owner-occupied dwellings, prepayment may be made at any time, but prepayment within seven years of the date of execution could be subject to a prepayment charge. The charge can be imposed only on that portion of the prepayment in excess of 20% of the unpaid balance paid in any 12-month period, and the prepayment charge is limited to six months' advance interest on that amount (Business and Professions Code Section 10242.6).

Usury interest rate Usury is charging a rate of interest greater than allowed by law. The rate of interest individuals (not exempt from usury limitations) can charge for loans to purchase, construct, or improve real estate cannot exceed 10%, or 5% greater than the rate designated by the Federal Reserve Bank of San Francisco to member banks for advances as of the 25th day of the month preceding the loan.

This usury rate does not apply to individuals who sell their property and carry back paper (purchase money loans).

The usury rate also does not apply to loans made or arranged by real estate brokers. The broker is exempt from usury restrictions, even though a loan made by a broker is outside the scope of activity requiring a real estate license (Civil Code Section 1916.1).

CASE STUDY The case of *Stickel v. Harris* (1987) 196 C.A.3d 575 involved a real estate broker who borrowed money at 30% interest for himself and his partners to buy property. The lender sued to recover principal and interest after foreclosure by a previous lienholder. The borrowers argued that the loan rate exceeded the 10% usury limit and was not within the usury exemption because the borrower was not acting as a real estate broker. The Court of Appeal upheld the trial court's award to the lender. In this case, the broker acted for both himself and his partners and expected compensation in the form of profit. Therefore, the loan was exempt from the usury limitation.

The broker's usury exemption does not extend to real estate salespeople. See *People v. Asuncion* (1984) 152 C.A.3d 422 for an example where a 288% interest rate was held to be usurious.

The usury rate applies to cash loans or forbearance (agreements granting additional time after a loan is due).

Points charged by nonlicensed lenders are considered to be interest in determining whether a loan is usurious.

If a contract is usurious, that portion of the contract calling for interest is void (interest cannot be collected). If a borrower has paid usurious interest, the borrower is entitled to recover the entire amount of the interest paid in the last two years plus treble damages (three times the interest paid) for the last year of the loan.

Impound accounts Impound accounts are trust account reserves kept by the lender for advance payments made by the borrower for property taxes and insurance. The impound account protects the lender in that funds will be available for the taxes and insurance when they are due.

Impound accounts cannot be required for single-family residences unless

- they are required by state or federal law (such as FHA and VA loans), or
- the trustor has failed to pay two consecutive tax payments, or
- the loan is 90% or more of the property value or sales price, and the lender requires impounds.

Civil Code Section 2954.1 prohibits excessively large impound accounts. The borrower cannot be required to deposit more than would be required in a federally related loan under the Real Estate Settlement Procedures Act (RESPA). The section also requires that any sum in excess of monies reasonably necessary to pay obligations must be refunded to the borrower within 30 days, unless agreed otherwise. The lender also must make payments in such a manner that insurance is not canceled or property taxes are not allowed to become delinquent.

RESPA (12 U.S. Code § 2609) limits the amount of impound accounts for federally related lenders (lenders with Federal Deposit Insurance Corporation [FDIC] insurance).

Impound accounts are required for FHA loans. Lenders on FHA loans can require a tax reserve of six months and an insurance reserve of one year.

Impound accounts are not required on VA-guaranteed loans, although the lenders customarily require them.

For impound accounts for one to four residential units, state-licensed lenders must pay interest of at least 2%.

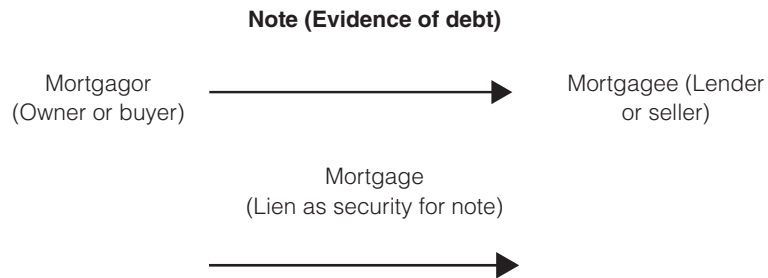
Attorney fees Notes frequently provide that the maker agrees to pay reasonable attorney fees if legal action becomes necessary for collection.

MORTGAGES AND TRUST DEEDS

While a promissory note is the evidence of the debt, a security device, such as a mortgage or a trust deed, provides security for the note. Mortgages and trust deeds **hypothecate**, or pledge, the property (the borrower keeps possession but gives a security interest).

Mortgages

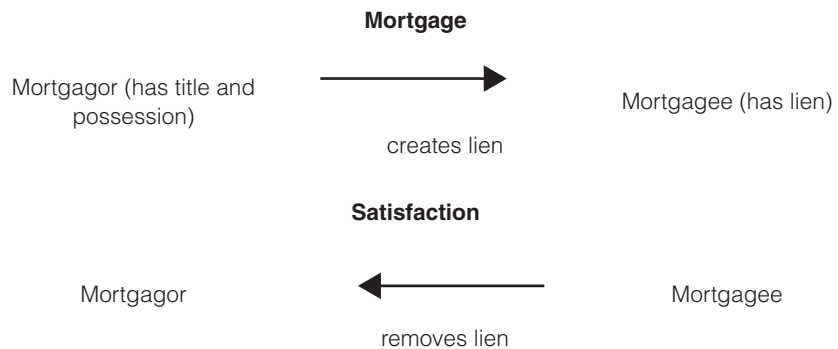
A **mortgage** is a two-party security instrument in which the mortgagor is the owner or the buyer who gives a lien to the mortgagee. The mortgagee is the lender in cases of a hard-money loan (where money actually is advanced) or the seller in cases of a purchase money loan (where the seller finances the buyer).



Mortgages are a common real estate financing instrument in many states. California, however, favors trust deeds, and mortgages are seldom encountered.

In California, Civil Code Section 2924 provides that a transfer of title given for security purposes is considered a mortgage (a sale with an option of the seller to repurchase). Parties will enter agreements such as this in an attempt to evade the mortgagor's legal rights.

When a mortgage is recorded, it becomes a lien on the property. When the note is paid, the mortgagee gives the mortgagor a "satisfaction of mortgage." The satisfaction, when recorded, removes the lien. The **defeasance clause** in the mortgage provides for the cancellation of the lien upon full payment.



After payment of the note, if the mortgagee fails to record a satisfaction of mortgage within 21 days of a written request by the mortgagor, the mortgagee is liable for all damages, as well as the sum of \$500.

Mortgage foreclosure Under common law, the mortgagee received the property without a sale upon the mortgagor's default. This so-called strict foreclosure is not permitted in California.

In the event of nonpayment by the mortgagor, the mortgagee can enforce the lien and foreclose by court action. Because foreclosure is considered an equitable action, it must be brought in superior court.

The property is sold at a public sale conducted by the county sheriff. The mortgagee can bid the amount of the mortgage lien. Other bidders have to bid cash. Because a foreclosure sale would wipe out all liens junior to the foreclosing mortgage, a junior lienholder who wanted to protect his interest would have to bid against the foreclosing mortgagee.

CASE STUDY In the case of *Webber v. Inland Investments Inc.* (1999) 74 C.A.4th 884, Hyatt Land Development sold four properties to Forecast Mortgage Corporation, carrying back a \$754,000 second deed of trust that was later sold to Webber. Sanwa Bank made a \$3,653,650 first trust deed loan. Title was transferred to All Cities Mini-Storage. Inland Empire Investments bought the Sanwa Bank note and first trust deed. After default, Inland Empire Investments foreclosed, wiping out Webber's second trust deed. Forecast Mortgage Corporation, All Cities Mini-Storage, and Inland were all owned or controlled by James Previti.

Webber sued all the companies and Previti for declaratory relief and conspiracy to intentionally interfere with a contractual relationship.

The Riverside County Superior Court awarded Webber \$1,254,946 in compensatory damages and \$50,000 punitive damages.

The Court of Appeal affirmed as to interference with the contract.

Note: This case holds that it is an intentional interference with a contractual relationship for a borrower to use a corporate entity to acquire a senior lien, default on that lien, and foreclose in order to wipe out a junior lien. Because Previti owned or controlled all the corporations, the court had little difficulty in finding this to be a sham foreclosure with the intent of eliminating a junior lien.

When a junior lienholder forecloses, the foreclosure does not affect prior liens, but liens junior to the foreclosing lien are eliminated (the priority of liens, as discussed in Unit 7, is based on time of recording).

In the event the proceeds of the sale exceed the costs of the sale and the foreclosing mortgagee's lien, the excess goes to pay off junior lienholders in the order of their priority. If any money is left after paying off all the lienholders, it goes to the mortgagor.

The foreclosure sale is made by sheriff's sale in the same manner as a sale when execution is obtained on a judgment. The property is sold to the highest bidder. Notice of the sale must be posted on the property for 20 days and published once a week for three weeks in a newspaper of general circulation.

The mortgagor can stop the foreclosure anytime before the court decree date by paying past delinquencies plus costs and fees. Even if the note has an acceleration clause making the entire balance due if a payment is late, the mortgagor need only make the payments current.

The title that is given to the successful bidder is said to *relate back* to the date of the foreclosing lien. The result of this relating-back doctrine is that all subsequent liens other than liens for taxes or special assessments are eliminated by the foreclosure.

Right of redemption California statutes allow a mortgagor to recover the property after a judicial foreclosure sale. This is called the **right of redemption**. If the sale proceeds are less than the foreclosing mortgage debt, the mortgagor has a one-year period of redemption. If the sale proceeds satisfy the foreclosing mortgagee's debt, the period

of redemption is three months. By paying the purchaser at foreclosure the sale costs plus interest within the redemption period, the mortgagor can regain title. The mortgagor cannot waive this right of redemption.

Purchasers at mortgage foreclosure sales will have difficulty disposing of property while the mortgagor can still redeem.

The mortgagor has the right to occupy the property during the redemption period, although the mortgagee is entitled to reasonable rent during this period. In reality, the mortgagee might have difficulty collecting the rent, and courts tend to be reluctant to evict a mortgagor during the redemption period.

Mortgages and trust deeds for income property often provide for an **assignment of rent**, which allows the mortgagee to take over the property during the redemption period and apply the rents received to the debt. Without this provision, the mortgagor would keep possession and would be collecting the rents.

Only the mortgagor or successors in interest (heirs or assignees) can redeem after the foreclosure sale.

After the sale, the sheriff provides the high bidder a **certificate of sale** stating that the property is subject to redemption rights. This certificate of sale is recorded. Within one week of the sale, the sheriff must inform the debtor of the right to redeem.

If the property is not redeemed during the redemption period, the sheriff issues a *sheriff's deed*. The grantee receives all the rights of the foreclosed mortgagor without the foreclosing lien and liens junior to it. Liens senior to the foreclosing lien will still be in force against the property. At this point, the grantee can evict the mortgagor or tenant in possession.

Tenant's rights at foreclosure Tenants must be provided with a notice regarding their right to purchase a foreclosed property. The tenant has 15 days after the foreclosure sale to match the last and highest auction bid.

Eligible bidders They follow the same procedure except their bid must exceed the highest foreclosure bid. An eligible bidder can be a nonprofit or a public agency.

Homestead Protection Homeowners are protected against foreclosure of their residence because of unsecured obligations. The exemption from foreclosure is the greater of the following:

- \$300,000
- The median sales price for a single-family home in the county for this prior calendar year, not to exceed \$600,000 (the exemption amount is adjusted annually for inflation)

Deficiency judgments Should the judicial foreclosure sale bring less than the amount owed on the mortgage, the foreclosing lienholder can apply for a **deficiency judgment** for the difference, but must do so within three months of the sale. Only after the judicial foreclosure sale can the mortgagee sue the mortgagor for any deficiency amount.

Very few deficiency judgments are granted, because they are not possible in the following four situations:

1. **Foreclosure is under a power-of-sale clause.** (No deficiency judgments for mortgages or trust deeds foreclosed under power of nonjudicial sale are allowed.)
2. **The foreclosing lien is a purchase money loan.** There can be no deficiency judgment when the seller provided credit. The seller started out owning the property and ends up owning it, a situation called a *purchase money mortgage*.
3. **Money advanced by a third-party lender for purchase purposes is also a purchase money loan.** A mortgagee who provides funds to purchase one to four residential units for occupancy by the mortgagor cannot obtain a deficiency judgment. Purchase money third-party lenders can obtain deficiency judgments for five or more residential units, non-owner-occupied residential property, or nonresidential property.
4. **The fair market value of the property is equal to or greater than the amount of the lien.** A deficiency judgment is possible only for the difference between the fair market value of the property and the amount of the lien. This prohibits a mortgagee from bidding much less than is owed to manufacture a deficiency.

CASE STUDY In the case of *Enloe v. Kelso* (2013) 217 C.A.4th 877, the lender making a first and second trust deed would not allow the seller to carryback a third trust deed. After escrow was closed, the seller took back a third trust deed, which was disguised to appear to be a hard-money loan. After a short sale, the seller sought a deficiency judgment.

The trial court granted judgment in favor of the buyer and the Court of Appeal affirmed, holding that the third deed of trust was in fact a purchase money loan, which barred a deficiency judgment (Code of Civil Procedures 580b).

Note: An attempt was made to show that the seller had given cash to the buyer for the trust deed.

5. If a lender gives approval for a short sale involving one to four residential units, a deficiency judgment is not possible.

Anti-deficiency-judgment protection does not extend to debtors when the loan is procured by fraud.

A borrower cannot waive anti-deficiency-judgment protection in advance or at the time of the loan or loan renewal when the buyer is likely to be under the coercion of the lender.

A sold-out junior lienholder whose rights were lost by the foreclosure may sue the mortgagor directly for the note. However, if the junior lienholder had made a purchase money loan, which would have been precluded from a deficiency judgment, no further collection would be possible.

CASE STUDY The case of *First Commercial Mortgage Co. v. Reece* (2001) 89 C.A.4th 731 involved a purchase money loan of \$207,593 that was allegedly made based on an inflated \$215,000 appraisal. The lender, First Commercial, sold the loan to First Nationwide Mortgage Co. with the agreement that First Commercial would repurchase any bad loans.

After default of the buyer, First Nationwide foreclosed and purchased the property with a full-credit bid. As agreed, First Commercial repurchased the property, which they subsequently sold for \$79,252. First Commercial then sued the mortgage broker alleging fraud and negligent representation, as well as breach of contract.

The superior court ruled that the full-credit bid rule at foreclosure satisfied the loan debt; therefore, this plaintiff could not prove damages. The Court of Appeal reversed, ruling that the full-credit bid does not bar a repurchasing lender who suffers damages by misrepresentation, fraud in the inducement, or breach of contract.

Note: If First Commercial had been the one making the full-credit bid, then it would have been an admission of property value, so damages could not be shown.

Even though a deficiency judgment is not possible, it could be a mistake for a creditor to bid the full amount owed under the foreclosing lien.

CASE STUDY The case of *Altus Bank v. State Farm Fire and Cas. Co.* (1991) 758 F. Supp. 567 involved a fire loss. After the loss, there was a foreclosure sale and the lender bid its full-credit amount owed. The lender then brought action against the insurance carrier for acting in bad faith by refusing to pay the insurance loss.

The court held that the mortgagee's full-credit bid at foreclosure extinguished the mortgagee's right to make a claim against the homeowner's insurer for the fire loss. In this case, the loss exceeded the debt. By bidding the full amount of the debt owed, the bank cut off any chance of other offers relating to true value. By a full-credit bid, the bank was stating that the property was worth what they paid. The court also pointed out that the insurer had no duty to tell the mortgagee the effect of a full-credit bid.

During the early 1980s, some purchasers were buying property without down payments, and then renting the property. They were pocketing the rent receipts and not making payments on the mortgages. Because the sellers' financing constituted purchase money loans, they felt immune from deficiency judgments.

Civil Code Sections 890–895 were enacted to provide criminal penalties for using rental income during the first year after purchase without first applying it to payments on debts secured by the property (**rent skimming**).

Deed in lieu of foreclosure Often a mortgagee, instead of foreclosing, will have the mortgagor deed the property to the mortgagee. The mortgagee benefits by saving time and foreclosure costs, as well as by avoiding the mortgagor's rights of redemption. The mortgagor benefits by avoiding having the credit report show a foreclosure. Deeds in lieu of foreclosure often are given in exchange for cash or several months' free rent.

A foreclosure of a prior lien will wipe out tenant leases entered into after the lien was created. When rents may have declined on commercial property, creditors have been negotiating deeds in lieu of foreclosure to hold the tenant to leases that are advantageous to the lessor. While a foreclosure wipes out the tenancy, a deed merely transfers the lessor's interest.

A deed in lieu of foreclosure should not be used without a title search. The mortgagee could end up getting the property back subject to a number of liens, such as recorded judgments against the mortgagor. These junior liens would have been eliminated by a foreclosure but now could be in a priority position and able to foreclose on the property. A grantee of a deed in lieu of foreclosure could be buying litigation.

An **antimerger clause** in a mortgage provides that the senior lienholder will retain priority over junior liens in the event of merger. Normally, a lien is extinguished by merger when the lienholder acquires title. If there is an antimerger clause, a foreclosing junior lienholder will be paid only after the sale proceeds have satisfied the senior encumbrances.

A deed in lieu of foreclosure that really was intended as a security device, giving the creditor greater security, rather than as a title transfer, will be considered invalid because it attempted to defeat the debtor's statutory redemption rights.

Some mortgages have sale provisions that provide for a nonjudicial sale in the event of default. These sales would be similar to the sale provision of trust deeds.

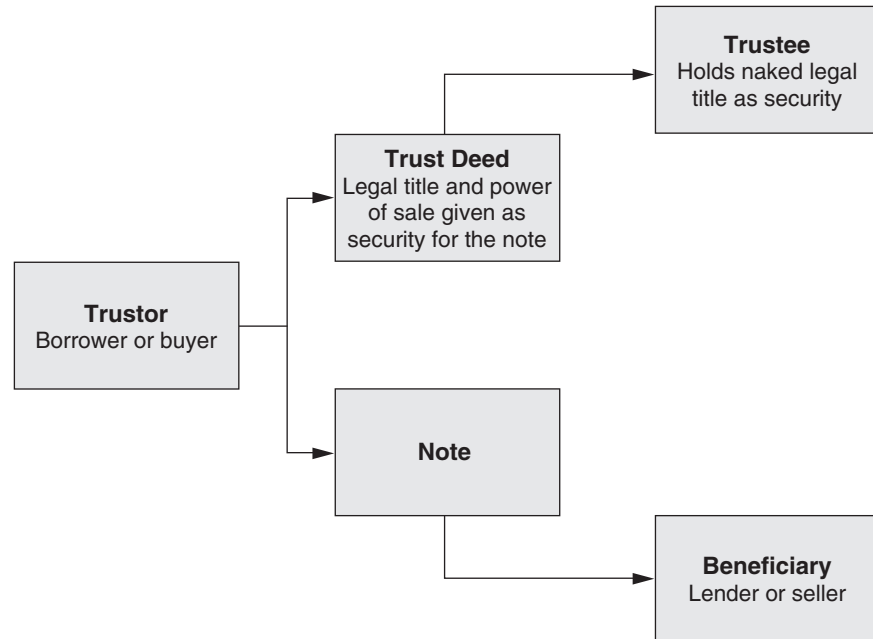
Mortgage Forgiveness Debt Relief Act of 2007 Forgiveness of a debt is considered a taxable gain to the debtor. This act provided debt forgiveness to avoid foreclosure (a short sale) when the property was the principal residence of the debtor. The debt relief would not be taxed as imputed income by the federal government. The law expired; however, if the property is a qualified principal residence, the debt relief will be excluded from taxation.

Trust Deeds

Because of the lengthy and costly foreclosure associated with mortgages, as well as the redemption rights that can accrue after the foreclosure sale, the **trust deed** is the most common real estate financing instrument in California.

While a mortgage is a two-party instrument, a trust deed is a three-party transaction. Naked legal title is transferred by the buyer or borrower (the *trustor*) to a third person (a *trustee*) as security for a note that is given to the lender or seller (the *beneficiary*).

Figure 10.1 shows a trust deed flowchart.

FIGURE 10.1: Trust Deed Flowchart

When the trustor finishes paying off the note, the beneficiary delivers the note and trust deed to the trustee with a request for a full reconveyance. Failure to provide the deed of reconveyance within 30 days of demand can subject the trustee to damages plus a \$500 penalty (the same penalty as for failure to provide satisfaction of a mortgage). Failure to provide the deed of reconveyance could, however, result in more than a \$500 penalty.

CASE STUDY The case of *Pintor v. Ong* (1989) 211 C.A.3d 837 involved a lender who refused to deliver a deed of reconveyance after the note had been paid. The failure to remove the lien made it impossible for the plaintiffs to refinance a first trust deed, which would have allowed them a lower interest rate. They sued for damages for emotional distress and were awarded \$15,000, which was upheld upon appeal.

Trust deed foreclosure In the event the trustor defaults on trust deed obligations, foreclosure is made by private sale and is relatively quick and inexpensive, because the trustee—not the trustor—has the legal title. Default can occur for a number of reasons, such as failure to make loan payments, pay taxes, keep the property insured, or maintain the property.

Upon the direction of the beneficiary, the trustee forecloses by taking the following actions:

Three-month notification of default Within 10 days of recording the notice of default, a copy must be sent by registered mail to all people who recorded a request for notice, and at least 20 days before sale, the person authorized to make the sale must send,

by registered mail, a copy of the notice (often called *special notice*) of the time and place of sale to all those who recorded requests for notification.

According to Civil Code Section 2924b(3), within one month of recording the notice of default, notice must be sent by registered or certified mail to parties whose recorded interests provide constructive notice to the trustee.

The notice of default must advise the trustor of his right to sell before the trustee's sale.

Notice of sale The trustor can stop the sale up to five business days before the sale by curing any deficiency and paying costs. To cure the default, in addition to the amount shown in the notice of default, the debtor must also cure all "recurring obligations"—current payments, property taxes, insurance, senior lien payments, et cetera—not shown in the notice. If the sale is extended for more than five business days, the reinstatement period is revived.

Notice of trustee's sale for one to four residential units must contain a notice to the owner how to seek postponement of trustee's sale. The lender also must make a good-faith effort to provide information as to sale date postponements to people who request such information.

Notice of sale must be published once a week (three times) for 20 days and not more than 7 days apart. Notice also must be recorded and posted in a public place, such as city hall or the courthouse, and on the property.

Foreclosure avoidance At least 30 days before filing a notice of default, a party seeking to foreclose an owner-occupied residential property must contact the owner to explore options to avoid foreclosure. The notice of default must indicate that such contact was made. There is no requirement that an agreement be reached.

CASE STUDY California Civil Code Section 2923.5 requires the mortgagee to contact the homeowner to explore options to avoid foreclosure. In the case of *Mabry v. Superior Court* (2010) 165 C.A. 4th 208, the notice of default indicated that Section 2923.5 had been complied with. The debtors sued to postpone foreclosure, alleging they had not been contacted to explore options to avoid foreclosure. The trial court denied the request, ruling that federal law prohibiting states from impairing lenders' ability to transfer loans preempted state mortgage law.

The Court of Appeal reversed, ruling that the state law did not impair federal law. Civil Code Section 2923.5 merely affected the procedure of foreclosure not substantive rights.

Trustee's sale A trustee's sale is a public sale in which title is given in the form of a trustee's deed to the highest bidder.

Because deficiency judgments are not possible when foreclosure is made under the sale provisions of a trust deed, the beneficiary generally bids only the amount of the lien. However, when a suit for waste is contemplated, the bidder can bid less than the amount of the lien. Other bidders are required to bid cash or by certified check.

Trustee's sales, like mortgage sales, wipe out all junior encumbrances, except a mechanic's lien, where work commenced before the trust deed or mortgage being recorded (in which case the mechanic's lien would have priority; see Unit 11).

The trustee may postpone the sale any number of times at the trustee's discretion without published notice and announce a new sale at the same location. However, the sale may not be postponed beyond 365 days from the original sale date.

The sale must be on a business day between 9:00 am and 5:00 pm in a public place within the county where the property is located. Lenders who wish to take title to property often schedule the sale at a remote location within the county in order to discourage other bidders.

Trustees may reject all bids if they believe they are inadequate.

Criminal penalties can be imposed for bid-fixing or offering or accepting consideration for not bidding (bid chilling).

CASE STUDY The case of *Lo v. Jensen* (2001) 88 C.A.4th 1093 involved a foreclosure sale by a condominium association for \$5,412 in assessments. The day before the sale, one defendant called the other defendant to ascertain interest in the sale. Both defendants regularly competed at sales for similar property. They decided to bid together and share expenses and profits. Both had been considering bids around \$100,000. They estimated the fair market value of the condominium at between \$150,000 and \$160,000. The partners were able to buy the property for \$5,412. There were no other liens against the property.

After the sale, the foreclosed owners sued the buyers for violation of the Civil Code Section 2924h(g), which states, "It shall be unlawful for any person, acting alone or in concert with others, to (1) to offer to accept from another, any consideration of any type not to bid, or (2) to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage."

The trial court vacated the sale, ruling that the defendants violated Civil Code 2924h(g) by restraining bidding. The Court of Appeal affirmed, noting that there was unfairness and an inadequate price. The plaintiffs were denied the benefit of competition that they were entitled.

CASE STUDY In the case of *CTC Real Estate Services v. Lepe* (2006) 140 C.A. 4th 856, Lepe was the victim of identity theft. An unknown perpetrator used her name, Social Security number, and credit to purchase real estate and obtain two loans against the property. Lepe's signature was forged. The loans were not paid, but foreclosure resulted in an excess of \$51,333.87 over the amount due on the two trust deeds. While the attorneys for the trustee believed it would be equitable for Lepe to have the surplus, the superior court ordered that the money be paid to the Los Angeles County general fund.

The Court of Appeal reversed, ruling that the surplus should be paid to Lepe. She had been the victim of identity theft and was entitled to the assets stolen even if the value exceeded that which was stolen.

Note: This decision was really based on equity rather than law. Lepe's credit was damaged, and the court felt she should be entitled to any surplus.

After the trustee's sale, the trustor has no redemption rights and the purchaser is entitled to immediate possession. (Reinstatement rights are rights of the debtor before the foreclosure sale, while redemption rights are rights to regain the property after the sale, such as in a mortgage foreclosure by court action.)

Foreclosure by court action If a trust deed failed to include the power of sale, foreclosure would have to be made by judicial sale, the same as for a mortgage.

Any trust deed can be foreclosed by court action rather than by sale under its sale provisions. The reason for foreclosing a trust deed by court action would be to obtain a deficiency judgment. If the trust deed is foreclosed as a mortgage, the trustor has the same redemption rights as a mortgagor.

A creditor can choose to sue directly on the note for the full amount due; however, a creditor who does so gives up the right to foreclose on any security interest.

CASE STUDY In the case of *Bank of America v. Daily* (1984) 152 C.A.3d 767, a borrower defaulted on a loan secured by real property. The Bank of America seized the amount in the borrower's checking account as a setoff against the loan. The bank then attempted to foreclose on the property. The borrower raised the defense that the bank had waived its security interest. The court held that a creditor is entitled to only one form of action. In this case, the bank elected to forgo its right to the security in taking the defendant's bank account. Bank of America lost its substantial security in a valuable property by seizing a relatively small checking account.

Junior lienholders Because beneficiaries of second trust deeds would be wiped out by senior liens foreclosing, the second trust deed beneficiary would want to know of the senior lien foreclosure to protect their junior interests.

By recording a *request for notice of default*, the junior lienholder will be notified of any “notice of default” by the trustee. The junior lienholder can then stop foreclosure and cure the trustor’s deficiency by making the trustor’s payments. The junior lienholder can then start a foreclosure (based on the monies advanced) and give a three-month notice of default and notice of sale and have a trustee’s sale. By buying at the sale, the second trust deed beneficiary owns the property subject to senior encumbrances but wipes out all encumbrances that were junior to it.

Delay by the senior lienholder in foreclosing could result in the junior lienholder’s having to cure a significant delinquency. However, with the borrower’s written consent, the junior lienholder can request notice from the senior lienholder when the trustor becomes more than four months delinquent (**notice of delinquency**). For a \$40 fee, the right to notice is good for five years. Five-year renewals can be obtained by paying a \$15 fee.

Liens by nonowners People who give a mortgage or trust deed on property they do not own will have created a valid lien if they later acquire title. As an example, if a son gives a mortgage or trust deed on a property owned by his father, the lienholder will have no right against the property because the lien was not given by the owner. If the son later acquires title to the property from the father, the lienholder will be able to make a claim against the property to satisfy the lien.

Fictitious trust deed Recording costs are charged per page. To reduce such costs, lenders record what is known as a master **fictitious trust deed** that includes all of their special provisions (boilerplate). Each trust deed then can be a simple one-page document that incorporates by reference all the provisions of the fictitious trust deed.

Repossession of mobile homes Mobile homes that have become real property are foreclosed in accordance with the trust deed. Mobile homes that are not real property are foreclosed in accordance with the Commercial Code.

If the creditor repossesses a mobile home, any person liable under the contract can reinstate the contract by paying the amount in default plus costs and expenses. This right continues until the mobile home is sold in foreclosure. This right of reinstatement may be exercised only once in any 12-month period and only twice during the period of the contract.

The buyer may be precluded from reinstatement if

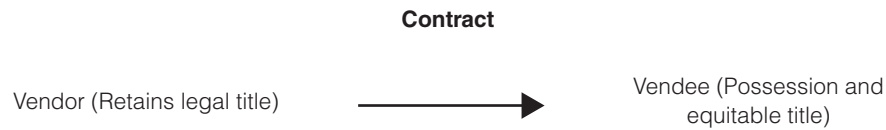
- the buyer provided false credit information to obtain the loan,
- the buyer moved the mobile home to avoid repossession, or
- waste has been committed on the mobile home.

In these cases, the buyer must pay the entire balance due plus costs.

Any sale proceeds in excess of liens and repossession and sale costs are paid to the former owner. A deficiency judgment from the sale is possible only if substantial damage to the mobile home has occurred (*Cornelison v. Kornbluth* (1975) 15 C.3d 590).

Real Property Sales Contract

A **real property sales contract**, contract of sale, or land contract is a two-party instrument whereby the seller (vendor) retains legal title and transfers possession to the buyer (vendee).



The vendee does not get a grant deed until the vendor has been fully paid. A real property sales contract can prohibit prepayment for one year. Therefore, the grantor would not be required to convey legal title for one year. The buyer on a land contract for one to four residential units has the right to prepay a land contract without penalty after 12 months.

The danger for the vendee in a real property sales contract is that the vendor might be unable to transfer marketable title to the vendee when the contract is paid. Vendees can, however, protect themselves by ensuring that the contract is recorded (the vendor must acknowledge the contract for it to be recorded) and obtaining title insurance. (Title insurance is now available for buyers under land contracts.) If a contract were not recorded, the vendor could encumber the property beyond the amount due by the vendee.

A land contract must state the number of years required to pay it off. If taxes are included with the payments, the land contract must include the basis for the tax payment, and the taxes must be kept in a separate escrow account. Land contracts also must include a legal description of the property and must indicate all existing encumbrances.

The risk of loss in a land contract sale is with the buyer, even though the seller retains the legal title. Without the written permission of the buyer, a seller under a land contract cannot encumber the property in an amount exceeding the amount owed on the contract. The seller must apply payments received from the buyer to the encumbrances so that the encumbrances will be paid up when the purchaser has finished paying.

If the seller sells their interest in the contract to another party, the seller also must convey title so that the buyers can get title when they finish paying off the contract.

The case of *Tucker v. Lassen Savings and Loan Association* (1974) 12 C.3d 629 held that a sale by a land contract was not an alienation because title did not pass. Therefore, a land contract sale would not automatically trigger the due-on-sale clause. This decision created a revival of interest in land contracts. Since the passage of the Garn Act, land contracts are no longer a means to avoid due-on-sale provisions, although unrecorded land contracts are still used for this purpose. The benefits probably are outweighed by the dangers to the buyer. As an example, if a land contract were not recorded, an unscrupulous vendor could borrow against the property. When the vendee finished paying on the land contract, the vendee could find that there was still a substantial lien against the property.

A former advantage land contracts had over trust deeds was quick foreclosure. Because of this feature, they often were used when the purchaser had a very low down payment. Courts no longer allow the automatic forfeiture provisions of land contracts, which means that sellers require a quiet title action.

CASE STUDY The California Supreme Court held in *MacFadden v. Walker* (1971) 5 C.3d 809 that a buyer's default could not be used by a seller to terminate a land contract automatically even though the default was intentional.

CASE STUDY The California Supreme Court, in *Smith v. Allen* (1968) 68 C.2d 93, allowed a land contract purchaser to get back payments that exceeded the fair rental because the payments unjustly enriched the seller.

CASE STUDY In the case of *Petersen v. Hartell* (1985) 40 C.3d 102, the California Supreme Court held that a purchaser who willfully defaulted but had made substantial payments or improvements could redeem before a judgment in a quiet title action and within a reasonable period after such judgment as set by the court.

The time and expense of a quiet title action plus the fact that the purchaser may be entitled to a refund or redemption has made the land contract disadvantageous to California sellers.

A vendor under a land contract who violates the law in impairing the rights of the vendee could be subject to a fine of up to \$10,000 or up to one year in county jail or state prison, or both.

Sales in Foreclosure

It is illegal for any person to take unconscionable advantage of a property owner in default. The owner-occupant trustor may void an unconscionable sale of a residence within two years of the date of transaction (Civil Code Section 2945 et seq.), unless the owner-occupant was given a five-day written right to rescind.

Many individuals and firms have gone into the foreclosure consultant business claiming to be able to delay or halt foreclosures. Consumers have a three-day cancellation right after signing a consultant agreement. Consultants must post a \$100,000 bond and register with the California Department of Justice.

Consultants may not charge or demand an advance fee before completion of the contracted services.

Real estate brokers are exempt from the Mortgage Foreclosure Consultants Act. They may arrange a loan modification but cannot charge an advance fee. Fee arrangements must state, “It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly and ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these services.”

Real estate agents must take particular care when dealing with owner-occupants not represented by an agent who have received notification of default. As a special precaution for the agent, the property owner should have legal representation. Civil Code Sections 1695.15 et seq. and 2945.95 et seq. require that buyer’s agents of property in foreclosure and representatives of foreclosure consultants who will not be occupying the one- to four-unit property as their residence must provide written proof to the seller that

- they have a real estate sales license and
- there is a surety bond for twice the fair market value of the property being purchased (such bonds are not widely available in California).

Equity purchasers and foreclosure consultants are liable for all damages from statements made by their agents. Violations of the law make the sales contract void and may require damage payments to the seller (no time limit is set).

The effect of these statutes is that buyers’ agents for investors/buyers should avoid property in foreclosure unless the parties will agree to an agent’s representing the seller only, because a surety bond is then not required.

CASE STUDY *In re Wallace Reed Phelps* (2001) 93 C.A.4th 451, the case involved an owner who moved out of her residence while it was in foreclosure. She was subsequently contacted by criminal defendant Wallace Reed Phelps and induced to sell the home to him. On the advice of his attorney, the defendant pleaded guilty to violating the Home Equity Contracts Act. The defendant was not allowed to withdraw his guilty plea, and he was sentenced for a felony violation.

The Court of Appeal reversed, ruling that Phelps could not have violated the Home Equity Sales Contract Act or the Mortgage Foreclosure Consultants Act because at the time he contacted the homeowner, she was not living in her home. The statutes apply to owner-occupants, and the court held that Phelps was wrongfully convicted.

CASE STUDY The case of *Garcia v. World Savings* (2010) 183 C.A. 4th 1031 involved a mortgage broker who was aiding a homeowner in default on a mortgage. The mortgage broker notified the lender that the homeowner was in the process of refinancing other property to pay off the loan. The lender agreed to postpone the foreclosure sale until August 29. On August 27, the broker informed the lender that the refinance might not close until early September. On August 29, messages were left with the lender that the loan would be closed within a week. The creditor did not respond but sold the home on foreclosure on August 30.

The homeowner sued the creditor, and the trial court entered summary judgment against the homeowner.

The Court of Appeal reversed and sent the case back for trial on the promissory estoppel cause of action. A lender who promises not to foreclose when the lender is legally entitled to may still foreclose if there was no consideration for postponement. However, if debtors do something they were not obligated to do based on the lender's promise, they have acted to their detriment and the doctrine of promissory estoppel applies.

California Homeowner Bill of Rights

Effective in 2013, the California Homeowner Bill of Rights was intended to guarantee fairness and transparency for homeowners (as well as widows and widowers) in the foreclosure process. Provisions include the following:

- Prohibition against dual-track foreclosure. When a homeowner applies for loan modification, the foreclosure process stops until the application is processed.
- There must be a single point of contact for homeowners as to loan modification.
- Lenders who file unverified documents (robo-signing without reading or having personal knowledge of facts stated) are subject to \$7,500 fine per loan, as well as action by licensing agencies.
- Lender violation of the foreclosure process is subject to injunctive relief, as well as damages after a sale.
- The statute of limitations to prosecute mortgage-related crimes is extended from one year to three years.
- To curb blight, local governments and receivers can allow time to cure code violations and can compel buyers of foreclosed property to pay for upkeep.

LOAN TYPES, CONDITIONS, AND REGULATIONS

Construction Loans

Construction loans are normally short-term loans for a term of one to three years, depending on the type of building, and customarily bear a higher rate of interest than permanent financing. Loan payments ordinarily are released based on performance of construction tasks. The final payment usually is not made until the mechanic's lien period has expired.

If the builder has not protected the lender through a bond, the lender will insist on lien waivers from all material suppliers and subcontractors. Otherwise, the money might not be sufficient to finish construction.

The payments under construction loans are known as **obligatory advances** because the lender is obligated to make the payments.

The advances made under the loan are covered in a **dragnet clause** that includes the future advances and prevents a subsequent lien from taking priority over the loan advances.

Obligatory advances take precedence over intervening liens, but an optional advance (not required by the original loan agreement) could be junior to intervening liens.

Seller Financing

Besides mortgages, trust deeds, and real property purchase contracts, several additional financing methods are available exclusively to sellers.

Wraparound trust deed When a property has an assumable below-market-interest-rate loan, the seller could be better off using a wraparound loan than letting a buyer assume the loan and taking back a second trust deed.

A **wraparound loan** (all-inclusive trust deed) is written for the amount of the existing loan, as well as for any seller financing. For example, assume a home is to be sold for \$70,000, the seller has an existing \$30,000 assumable loan at 6%, and the buyer has a \$10,000 down payment. The wraparound loan could be written for \$60,000 at 12% interest. The seller would then get 12% over the entire \$60,000.

\$60,000 at 12%	{	\$30,000 first trust deed on which seller pays 6%
		\$30,000 seller's equity at 12%

The seller, by getting a 6% interest differential on the first trust deed, is getting the equivalent of 18% interest on his or her equity.

Because wraparound loans involve seller financing, usury limitations do not apply.

If the buyer assumed the first trust deed and gave a second at 12%, this situation would exist:

First trust deed, \$30,000—buyer assuming at 6%

Second trust deed, \$30,000—buyer paying seller 12%

If the first trust deed had a balloon payment and the seller failed to include one in the wraparound loan, the seller could find that costly refinancing was necessary, and the interest rate being paid might end up exceeding the interest rate being received.

Besides interest differentiation, another advantage that a wraparound loan offers to a seller is that the seller actually makes the payment on the priority loan so she knows it is not in default. Because the buyer is not making the payments on the first trust deed, some buyers require lender verification that payments are being made.

Lease options Lease options could be subterfuges to avoid the due-on-sale clause, as well as keep the property from being reassessed for property taxes.

These leases might have a large down payment (fee for the option), high rent, and an option to buy at a very low purchase price at a particular time when the existing loan is almost paid off. The courts could be expected to regard such an arrangement as a sale that triggers the due-on-sale clause.

In determining whether a lease option is really a sale, the courts will consider the option cost, purchase price, and rental arrangements.

A disadvantage to the buyer on a lease option agreement is that rent for a residence is not a deductible expense, but interest on a loan as well as property taxes (within limits) are deductible on personal income tax returns. Because a normal loan payment is mostly interest, the purchaser on an option could be giving up a great deal more than the benefits sought.

Seller financing disclosure When the seller provides carryback financing for a sale involving one to four residential units, the arranger of credit (broker) must comply with special disclosure requirements set forth in Civil Code Sections 2956–2967. (See Unit 6.)

The disclosure requirements include

- identification of the note or other credit documents and of the property securing the transaction;
- description of the terms of the note or other credit document or a copy thereof;
- disclosure of the principal terms and conditions of each recorded lien that is or will be senior to the financing being arranged;
- a warning that if refinancing is required because of less than full amortization, such refinancing might be difficult or impossible to obtain in the conventional mortgage marketplace;
- clear disclosure of the fact, when applicable, that a negative amortization is possible as a result of a variable or adjustable interest rate and an explanation of its potential effect;
- an indication, when financing involves an all-inclusive trust deed, of who is liable for payments or responsible for defense in the event of attempted acceleration of a prior

encumbrance and what the rights of the parties are in the event of a loan prepayment that results in refinancing, prepayment penalties, or a prepayment discount;

- disclosure of the date and amount of the balloon payment, when involved, and a statement that there is no assurance that new financing or loan extensions will be available at the time of occurrence;
- a disclosure, when the financing involves an all-inclusive trust deed or real property sales contract, of the party to whom payments will be made and who will be responsible for remitting these funds to payees under prior encumbrances and that if that person is not a neutral third party, the parties may wish to have a neutral third party designated for these purposes;
- a statement that no representation of the creditworthiness of the prospective purchaser is made by the arranger and a warning that Section 580b of the Code of Civil Procedure may limit any recovering by the vendor of the net proceeds of the sale of the security in event of foreclosure (no deficiency judgment);
- a statement that loss payee clauses have been added to property insurance to protect the seller or that instructions have or will be given to the escrow or appropriate insurance carrier or a statement that if such provisions have not been made, the vendor should consider protecting himself by securing such clauses;
- a statement that a request for notification of default has been recorded or that, if it has not, the vendor should consider recording one;
- a statement that a policy of title insurance has been or will be obtained and furnished to the vendor and purchaser insuring their respective interests or that the vendor and the purchaser should consider individually obtaining a policy of title insurance;
- a statement that a tax service has been arranged to report to the vendor whether property taxes have been paid on the property and who will be responsible for the continued retention and compensation of the tax service or that the vendor should assure herself that all taxes have been paid;
- a statement about whether the security documents on the financing have been or will be recorded or a statement that the security of the vendor may be subject to intervening liens if the documents are not recorded; and
- a statement, when applicable, that the purchaser is to receive cash from the proceeds of the transaction (a cash-out buyer), and disclosure of the amount and source of the funds and the purpose of disbursement as represented by the purchaser.

Subordination agreements When a seller agrees to subordinate seller interests, the purchaser can put a later loan on the property that has priority over the seller's lien.

Builders often have sellers of lots agree to a subordinate loan. The builder then can obtain a construction loan that takes precedence over the purchase loan. In effect, the builder is using the seller's equity as collateral for the construction loan. If a loan simply states that

it will be subordinate, it will always be last in line. If it says it will be subordinate to a particular loan, then when that particular loan is paid off, it will regain priority.

Subordination clauses have been used in many fraud situations in past years. For example, suppose a person owned a home worth \$250,000 free and clear. A purchaser would offer the full price with \$100,000 down and the balance to be carried by the seller on a subordinate trust deed at 10% interest, all due and payable in six months. The seller might think it was an offer too good to be true and accept it. The buyer could then get a first trust deed for \$175,000, pay the seller \$100,000, and be a cash-out buyer with \$75,000. The buyer would not make any payments on the loan and would let the lender foreclose. To protect her interest, the seller would have to make the payments and foreclose on the second trust deed (subordinate). The seller would now have a house encumbered by a \$175,000 trust deed. Because it was a purchase money loan, the buyer would not be liable for a deficiency judgment.

Courts are determining in these cases that the buyer is guilty of fraud and has both civil and criminal liability.

One small protection for sellers who subordinate their interest is to include limitations on the amount and the terms of any loan to which they agree to be subordinate.

A licensee who fails to explain the effects of a subordination agreement fully to a seller could be liable for resulting damages.

Security Agreements—Personal Property

Under the Uniform Commercial Code, a security agreement (often called a *chattel lien* or *chattel mortgage*) creates a security interest in personal property. The security interest is then perfected when a **financing statement** has been filed with the secretary of state. Security agreements for consumer goods, growing crops, and growing timber are filed with the county recorder.

A financing statement, after filing, becomes a lien on the personal property for five years. Continuation statements can be filed for additional five-year periods. A termination statement, when filed, would remove the lien.

Personal property liens are extremely important in the sale of business opportunities and real property containing personal property, such as furnished motels and apartments. Besides a normal title search, a purchaser would want to check for possible liens against the personal property.

Taking Title With a Loan

When a property is sold **subject to** a mortgage or a trust deed, the purchaser takes title with the encumbrance but assumes no personal obligation to pay. While the purchaser must make the payments in order to keep the property, failure to do so would not subject

the purchaser to any deficiency judgment. The seller is the individual personally liable on the loan.

Loan assumption When a purchaser assumes an existing loan, the purchaser agrees to be primarily liable on the loan and could therefore be subject to a deficiency judgment in the event of default. The seller remains secondarily liable on the loan.

If a deficiency judgment is possible, it is in the best interest of a buyer to take a “subject to” loan, but it is in the best interest of a seller to insist that a buyer “assume” the loan.

There are currently very few loans that are assumable.

Blanket Encumbrances

A **blanket encumbrance** is a lien (mortgage, trust deed, or real property sales contract) that covers more than one property. In the absence of a release clause, which provides for the release of properties from the blanket encumbrance upon the payment of agreed sums, the debtor would have to pay off the entire blanket encumbrance to convey a property free of the lien.

Lenders often insist on blanket encumbrances to provide themselves with greater security.

Condition of Debt

Borrowers are entitled to know the amount owed (**beneficiary statement**). Beneficiaries and mortgagees must provide this information within 21 days of request. Failure to do so can result in a \$300 penalty plus damages. There can be a charge for this information, but the borrower must be given an annual statement without cost.

Statute of Limitations

The statute of limitations of four years on written agreements is applicable to mortgages. If a mortgagor has not made any payment within four years of a payment being due, the debt will be outlawed (not legally collectible) because of the statute of limitations.

Civil Code Sections 882.020–882.040 established a statute of limitations on trust deed powers of sale of 10 years from the due date of the obligation (last payment), or 60 years from creation of the obligation if the due date cannot be ascertained.

CONSUMER PROTECTION ACTS

Bankruptcy

Debtors frequently use bankruptcy to delay foreclosure. Filing of a bankruptcy petition stops the enforcement of any lien against the bankrupt’s property (11 U.S.C. 362a(4)). In a Unit 7 bankruptcy, the title to the bankrupt’s nonexempt property would pass to a trustee. The creditor would have to either get the trustee to release the property (if the debtor had no equity) or bring a motion for release of the property from the automatic stay.

Real Estate Settlement Procedures Act (RESPA)

The **Real Estate Settlement Procedures Act (RESPA)** is a federal loan disclosure act (12 U.S.C. 2601 et seq.) applicable to federally related first mortgage loans (loans made by lenders insured by FDIC or regulated by the Federal Home Loan Bank or any other federal agency).

The purpose of the act is to provide consumers with information on settlement costs in a timely fashion. The act applies to mortgage loans on one to four residential units, including mobile homes.

The Dodd-Frank Act (15 U.S.C. 1639b) mandated simplification of loan disclosures. The former good-faith estimate of closing costs has been combined with truth and lending disclosures. Dodd-Frank also provides for a simplified closing statement.

Under the TILA-RESPA rule, the lender is required to deliver a **Loan Estimate** form within three days of receiving an application and no later than seven days before consummation. The lender is also required to deliver a Department of Housing and Urban Development (HUD) loan information booklet to the borrower within three business days of loan application.

The TILA-RESPA rule Loan Estimate requirements do not apply to

1. HELOCs, (Home Equity Line of Credit)
2. reverse mortgages, or
3. chattel-dwelling loans (e.g., those secured by mobile homes).

The lender cannot charge for compliance with the act. The act prohibits kickbacks and referral fees from service providers. People giving or receiving kickbacks or referral fees are liable for civil damages and criminal prosecution, with penalties of up to one year's imprisonment and/or up to a \$10,000 fine.

A justifiable service must be provided for every fee charged, and the lender cannot require that the borrower purchase insurance from any particular firm.

The reserve for taxes and insurance (impound account) at closing cannot exceed a prorated estimate plus two months' impound payments.

RESPA allows a **controlled business arrangement**. A broker can refer business to service providers that the broker has a financial interest in. However, a disclosure must be made as to charges and relationships. The broker may only receive compensation based on profit sharing of the controlled business arrangement, not based on referrals. The controlled business arrangement must function as a separate business.

Equal Credit Opportunity Act

The **Equal Credit Opportunity Act** (15 U.S.C. 1691 et seq.), enforced by the Federal Trade Commission, prohibits credit discrimination because of sex, marital status, age, race, color, religion, or national origin, or because income comes from a public assistance

program or because applicant has in good faith exercised any right under the Consumer Credit Protection Act. Credit considerations are limited to income, net worth, employment stability, and credit rating. Individuals may file a discrimination complaint with HUD or sue for damages. The Department of Justice may file a lawsuit when it believes a pattern of discrimination exists.

Fair Credit Reporting Act

The **Fair Credit Reporting Act** (15 U.S.C. 1681 et seq.) restricts credit reports to those with a legitimate need. It also provides that

- investigative reports cannot be made unless they are disclosed to the consumers involved;
- consumers have a right to know the substance of the material in their credit file, as well as the names of the recipients of reports;
- consumers have the right to have disputed material investigated;
- consumers can place a statement of explanation of a dispute in their file; and
- consumers are entitled to a statement of the reasons for adverse action regarding their credit.

California Housing Financial Discrimination Act of 1977

The **1977 California Housing Financial Discrimination Act of 1977**, also called the *Holden Act*, states that a lender cannot deny a loan or change loan terms for reasons unrelated to the credit of the loan applicant. Thus, redlining is prohibited, as it is under the Civil Rights Act of 1968. All other discrimination also is prohibited (Health and Safety Code Sections 35800 et seq.). The state Business and Transportation Agency enforces the act and can require compliance as well as a \$1,000 payment to people discriminated against. The act applies to owner-occupied residences of one to four units.

Truth in Savings Act

The **Truth in Savings Act** (12 U.S.C. 4301) is a disclosure act requiring that term, fees, and interest yield on savings, checking, money market account, and certificates of deposit be revealed. Free checking cannot be claimed if there are any fees. The interest yield must be expressed as **annual percentage yield (APY)**, which is based on a one-year deposit considering compounding of interest.

Truth in Lending Act (Regulation Z)

Part of the federal Consumer Protection Act of 1968, the **Truth in Lending Act** (15 U.S.C. 1601 et seq.) provides a uniform manner of calculating and presenting the terms of consumer loans to enable borrowers to compare the annual percentage rates and finance costs.

The act's application to real estate is to advertisements for residential property that is to be owner-occupied. The disclosures of the act do not apply if there are to be fewer than four payments. Use of the following terms (*trigger terms*) in the ad requires full disclosure:

- Monthly payment
- Term of loan
- Dollar amount of any finance charges
- Down payment (if the seller is the creditor)

The full disclosure includes the interest rate at an annual percentage rate (APR), the down payment, the monthly payment, and the term of the loan.

Advertising the APR by itself does not trigger full disclosure.

The law makes **bait-and-switch advertising** (advertising property that is not available or that the advertiser will not sell, in an attempt to switch prospects to other property) a federal offense.

While all of the facts must be disclosed in a disclosure statement, the total dollar amount of finance charges need not be included for first mortgages or trust deeds or purchase money loans. The lender cannot charge for preparation of the disclosure statement.

When a loan is for consumer credit secured by a borrower's residence, a rescission right applies until midnight of the third business day following the completion of the loan. The borrower can waive rescission rights if the loan is needed for a bona fide emergency. If the lender fails to provide required disclosures, the borrower has three years to rescind the loan.

CASE STUDY In *Jackson v. Grant* (1989) 876 F.2d 764, Union Home Loan gave borrower Jackson the Truth-in-Lending Disclosure Statement and three-day notice of right to cancel on February 18. However, Union was not able to fund the loan until April 29. Almost three years later, Jackson elected to rescind the loan because of the lender's failure to comply with the three-day right of rescission and improper truth-in-lending disclosure. The Ninth Circuit Court of Appeals allowed Jackson to rescind and not to pay any interest on the use of the money for three years.

CASE STUDY The case of *Jones v. E* Trade Mortgage Corporation* (2005) 397 F 3d 810 involved a prospective borrower who wished to exercise the three-day right to cancel a loan under the Truth in Lending Act. The lender told the borrower that he would have to forfeit his \$400 “lock-in” fee that assured the interest rate. The reason the borrower wished to cancel was the fact that rates had fallen below the rate that had been “locked in.” The borrower then went through with the loan at the higher rate. Jones commenced the lawsuit, alleging that E* Trade failed to provide a “clear and conspicuous” disclosure of rescission rights.

The Court of Appeals in reversing the District Court dismissal of the claim held that E* Trade cannot be allowed to subvert the rescission right, including the right to return of all the property and money tendered in this transaction.

Note: This case means that “all” money paid to lender must be refunded if rescission right is exercised.

CASE STUDY The case of *Pacific Shore Funding v. Lozo* (2006) 138 C.A. 4th 1342 concerned the Lozos who obtained a \$28,000 mortgage on their home from Pacific Shore Funding. Two years later, Pacific Shore refinanced the loan for \$71,500 to pay off the first loan, as well as prepayment penalties. It is undisputed that Pacific Shore violated the Truth in Lending Act by failing to deliver notice of the right to rescind with the deadline for rescission.

The Appellate Court stated that “Lenders who omit the disclosures are subject to liability equal to the sum of all finance charges and fees paid by the consumer, unless the failure to comply with the statute is not material.” While the Lozos must repay the mortgage balance, Pacific Shore must refund all interest and fees paid, such as loan points, closing charges, and prepayment penalty.

Note: There is a split among federal circuit courts as to the right to rescind a loan, under the Truth in Lending Act after a refinance. The court commented, “There is no statutory authority for concluding that a refinance terminates the consumers’ rights to rescind the original loan.”

Willful violation of the Truth in Lending Act is punishable by a fine of not more than \$10,000 or imprisonment for not more than one year, or both. It is enforced by the Federal Trade Commission.

Predatory Lending

Predatory lending laws were enacted to protect homeowners from unfair and costly practices that stripped homeowners of their equity and often resulted in foreclosures. These **predatory lending** practices were frequently targeted at lower income and minority homeowners. California’s predatory lending law applies to refinancing and home equity loans. California’s **Covered Loan Act** (Financial Code 4970) defines a covered loan as one that does not exceed the conforming loan limit for a single-family mortgage loan established

by the Federal National Mortgage Association (FNMA) and either the APR is more than 8% above the yield for Treasury securities or the total points and fees exceed 6% of the loan. For covered loans,

- prepayment fees are limited to specified conditions and then only during the first three years of the loan;
- loans for five years or less must be fully amortized;
- negative amortization is limited to first loans and must be clearly declared;
- advance loan payments from the loan proceeds are not allowed;
- borrower default cannot trigger increases in interest rate;
- the loan originator must reasonably believe that the borrowers will be able to make payments from sources other than their equity in the property;
- payments from loan proceeds cannot be made directly to a home improvement contractor (can be made jointly to homeowner and contractor);
- the lender cannot recommend borrower default on any existing loan;
- the lender may not accelerate debt at lender's discretion (call provision);
- refinancing without discernible benefit to the borrowers is prohibited;
- steering a borrower to a higher-risk-rated or higher cost loan product than the borrower is qualified for is prohibited;
- structuring a loan as a line of credit as an attempt to circumnavigate predatory lending restrictions is prohibited; and
- any loan fraud is prohibited.

WEB LINK



For more information on predatory lending provisions and to review the law, check the California Department of Real Estate site: www.dre.ca.gov/files/pdf/AvoidingPredatoryLending.pdf.

Servicemembers Civil Relief Act of 2003

The act protects citizen soldiers and sailors called to active military duty (it does not apply to career military). Protections offered by the act include the following:

- Credit obligations entered into before active duty is limited to 6% (interest over 6% is permanently forgiven).
- Default judgments may not be entered because of failure to appear.
- A court order is required to foreclose on a service person while serving and up to one year thereafter.
- Families of service personnel may not be evicted without court order for rentals up to \$3,451.20 per month (2019).
- Service personnel may terminate residential leases and cellphone contracts, if transferred.
- Service personnel can terminate a car lease entered into before being called into service.

SUMMARY

A promissory note is the evidence of a debt. It is an unconditional written promise to pay a certain sum in money now or at a definite date in the future.

Some common provisions of notes are

- balloon payments, whereby the balance is due in full at a set date;
- due-on-sale clause, whereby the loan must be paid should the property be sold;
- due-on-encumbrance clause, which requires the loan to be paid if an additional loan is placed against the property;
- prepayment penalties for early payment;
- interest provisions—interest rates that are usurious cannot be collected;
- impound accounts, accounts for taxes and insurance that are kept by the lender; and
- attorney-fee clauses, which provide that the borrower pay legal fees necessary for collection.

A mortgage is a two-party security instrument whereby a mortgagor (borrower) gives a lien (the mortgage) to a mortgagee (lender). The mortgage lien is given as security for a note.

Deficiency judgments are judgments for any deficiency between the amount of the foreclosing lien and the foreclosure sale price. Deficiency judgments will not be granted when

- foreclosure is under a power of sale (thus trust deeds foreclosed under the sale provisions cannot result in deficiency judgments, except for VA-guaranteed home loans);
- the foreclosing lien is a purchase money loan; or
- the fair value of the property exceeds the foreclosing lien.

Trust deeds are three-party instruments in which the trustor (borrower) gives a note to a beneficiary (lender) and, to secure the note, gives a trust deed (naked legal title) to a third party (trustee). When the trustor pays the note in full, the trustee gives the trustor a deed of reconveyance, which, when recorded, removes the lien.

If the trustor defaults on payments, the trustee gives a three-month notification of default, which is followed by a 20-day notice of sale. At the end of this period, the trustee has a sale and gives the purchaser a trustee's deed. After this sale, no redemption by the trustor is possible. However, the trustor can stop the foreclosure by catching up on payments and paying costs anytime within five business days of the sale.

Junior lienholders would be wiped out by a trustee's sale. To protect their interests, they could record a request for notification of default. Upon being notified of default, they could stop foreclosure by making the trustor's payments and then foreclosing on their junior lien. They then could end up owning the property subject to the prior trust deed.

A real property sales contract is a two-party instrument whereby the vendor (seller) keeps the title as security and gives the vendee (buyer) possession. The vendee does not get a deed until the contract is paid up. Real property sales contracts must include a legal

description, state the number of years required to pay it up, indicate all encumbrances against the property, and if the payments include taxes, state the basis for the tax payment.

When a seller provides buyer financing, disclosure is required.

Subordination agreements are agreements that seller financing will be secondary to later-acquired liens. They place the seller's interest at risk.

Personal property is secured by a security agreement. A financing statement is filed with the secretary of state and becomes a lien on property for five years.

Continuation statements can be filed for additional five-year periods. A termination statement, when filed, releases the lien.

When property is sold subject to a loan, the buyer is under no obligation to pay the loan; but when the loan is assumed, the buyer agrees to be obligated for the loan, making a deficiency judgment possible.

There are a number of consumer protection acts, including the

- bankruptcy laws,
- Real Estate Settlement Procedures Act (RESPA),
- Fair Credit Reporting Act,
- Truth in Lending Act,
- Soldiers and Sailors Civil Relief Act, and
- seller financing disclosure laws. Predatory lending practices are prohibited for covered loans.

The Equal Credit Opportunity Act and California Financial Discrimination Act of 1977 prohibit discrimination against borrowers.

DISCUSSION CASES

1. A mortgagee paid less than the amount owed on the mortgage at a foreclosure sale. The mortgagor subsequently assigned his rights to his wife, who redeemed the property by paying the amount bid. **What are the rights, if any, of the mortgagee?**

Fry v. Bihl (1970) 6 C.A.3d 248

2. A plaintiff gave a first trust deed to her brother. On the same date, she gave a second trust deed. The second trust deed beneficiary did not know of the first trust deed. The brother foreclosed on the plaintiff, and the plaintiff subsequently filed for bankruptcy. The plaintiff later purchased the property from her brother. The beneficiary of the original second trust deed then foreclosed. **Was the foreclosure proper?**

Barberi v. Rothchild (1939) 7 C.2d 537

3. The mortgagee assigned the note and mortgage to the mortgagor. The mortgagor then sold the note and mortgage to the plaintiff. **What defenses does the mortgagor have against the foreclosing plaintiff?**

O'Meara v. De La Mater (1942) 52 C.A.2d 665

4. The beneficiary of a purchase money trust deed gave an additional loan to the trustor. Before this additional loan, the trustor had given a second trust deed to another beneficiary. The trustor defaulted, and the purchase money loan beneficiary foreclosed. **What are the rights of the parties?**

Pike v. Tuttle (1971) 18 C.A.3d 746

5. The defendant helped owners in default. He agreed to stop foreclosure actions against their homes. Houses were deeded to the defendant, who then deeded them to straw men who refinanced the property with larger loans. The property then was deeded back to the original owners clear of their default. The defendant kept the difference in the loans as his fee. **Has the defendant done anything wrong?**

United States v. Miller (1982) 676 F.2d 359

6. **Instead of a definite dollar amount, may a late charge be a percentage of the unpaid principal?**

Garrett v. Coast & Southern Federal Savings & Loan Ass'n. (1973) 9 C.3d 731

7. A vendor did not wish to go through with a contract of sale. The contract called for the contract of sale to be subordinate and imposed no limitations on subsequent loans. The vendees were not to make their first payment for three years. **Can the vendee get specific performance for this agreement?**

Handy v. Gordon (1967) 65 C.2d 578

8. The mortgagor was deceased. During foreclosure, the court appointed a receiver, who harvested the crops and applied the proceeds toward the mortgage deficiency judgment. The mortgage decree was not entered into until after the crops had been harvested. **Was the action of the receiver proper?**

Locke v. Klunker (1898) 123 C. 231

9. In a sale with an option to repurchase, the substantial disparity between the sales price and the option price provided the buyer with an adequate return on his money. **Does the usury law apply to this transaction?**

Orlando v. Berns (1957) 154 C.A.2d 753

10. **Would the fact that the broker is the borrower exempt a loan from usury limits?**

Winet v. Roberts (1986) 179 C.A.3d 909

11. **If a trustee's sale results in a sale for far less than the property's value, should the sale be set aside?**

Moller v. Lien (1994) 25 C.A.4th 822

12. The defendant borrowed \$7,060,000 from California Federal Bank (Cal Fed). The note provided for a prepayment clause. Cal Fed sold the loan to the Federal National Mortgage Association (Fannie Mae) at origination but retained the loan servicing. The defendant inquired if a prepayment penalty would be charged for paying the loan off early. Cal Fed said there would be none. The defendant refinanced without penalty, paying off the Cal Fed loan and receiving the canceled note and deed of reconveyance. Subsequently, Cal Fed had to pay Fannie Mae a prepayment penalty of \$653,998.74, which Fannie Mae refused to waive. **Is the defendant liable to Cal Fed for the prepayment penalty?**

California Federal Bank v. Matreyek (1992) 8 C.A.4th 125

13. A buyer gave a broker a promissory note as a finder's fee. The note was secured by property other than the property purchased. After the security property was foreclosed, the holder of the note sought a deficiency judgment. **Is the note holder entitled to a deficiency judgment?**

Kurtz v. Calvo (1999) 75 C.A.4th 191

14. A borrower on a \$73 million loan defaulted on loan payments and failed to pay property taxes. The owner continued to collect rent during the default period. After the lender foreclosed, the lender sued the borrower for bad-faith waste in failure to pay the property taxes, as well as for punitive damages. **Should the lender be entitled to these damages?**

Nippon Credit Bank v. 1333 N. California Blvd. (2001) 86 C.A.4th 486

15. A mortgage servicing firm mistakenly notified a default service that the minimum bid for the trustee's sale should be \$10,000. This was a clerical error because \$100,000 was intended (the loan balance was \$144,656.17). The trustee opened bidding at \$10,000 and the high purchasing bid was \$10,000.01. **Should the sale be set aside?**

6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 C.A.4th 1279

16. Before a sheriff's sale, a property was damaged by fire. The owner's claim was denied based on a belief the owner was involved in arson. The sheriff's sale proceeds paid off the lender, who also received a check from the insurer because the lender, who was a named insured, was not barred by arson. **Is the lender entitled to be paid twice?**

Washington Mutual Bank v. Jacoby (2009) 120 C.A.4th 639

17. **Is the holder of a second trust deed that is wiped out by foreclosure of a first trust deed, entitled to a judgment for loan balance and interest due?**

Cadlerock Joint Ventures, LP v. Lobel (2012) 206 C.A.4th 1531

18. A homeowner alleged that the lender orally agreed to postpone a trustee's sale and that the agreement was not honored. The homeowner sued on the basis of promissory estoppel. At the time of the sale the outstanding debt was \$570,147. The buyer at the sale paid \$420,000 and eventually sold the property for \$555,000. **Assuming the homeowner can show that an oral promise to postpone the sale was made, is the homeowner entitled to any damages?**

Jones v. Wachovia Bank (2014) 238 C.A.4th 935

UNIT QUIZ

1. To be a negotiable instrument, a note or draft need *NOT* be
 - a. a sum certain.
 - b. signed by the payee.
 - c. an unconditional promise or order.
 - d. in writing.
2. Refinancing without a discernable benefit to a borrower is
 - a. prohibited by the Servicemembers Civil Relief Act of 2003.
 - b. a violation of the Truth in Savings Act.
 - c. considered predatory lending.
 - d. a violation of the Mortgage Forgiveness Debt Relief Act of 2007.
3. A maker could *NOT* use which as a defense against a holder in due course?
 - a. A raised note
 - b. Prior payment of the maker to a previous holder
 - c. A note given for an illegal purpose
 - d. Legal incapacity of the maker
4. The usury law interest regulations do *NOT* apply to
 - a. seller purchase money financing.
 - b. cash loans.
 - c. loans made or arranged by mortgage loan brokers.
 - d. both a and c.
5. For loans on one to four residential units not made or arranged by a real estate broker, prepayment charges can
 - a. be charged only for five years.
 - b. not be charged on payments up to 20% of the original loan in one year.
 - c. not exceed six months' interest.
 - d. be all these.
6. The maximum period after a judicial foreclosure sale during which a mortgagor has the right to possession is
 - a. 30 days.
 - b. 90 days.
 - c. 6 months.
 - d. 1 year.

7. Which is more closely related to trust deeds than to mortgages?
 - a. Redemption rights after sale
 - b. Nonjudicial sale
 - c. Deficiency judgments
 - d. Legal title with borrower
8. Which constitutes default by a trustor?
 - a. Failure to pay taxes
 - b. Failure to make monthly payments
 - c. Failure to pay insurance
 - d. Any of these
9. Which is a *TRUE* statement regarding trust deeds?
 - a. A trust deed is a two-party instrument.
 - b. Legal title is held by the beneficiary.
 - c. Trustor can reinstate up to five business days before sale.
 - d. Foreclosure would wipe out all other encumbrances.
10. The total required foreclosure time under a trust deed (power of sale) is *MOST* nearly
 - a. 4 months.
 - b. 9 months.
 - c. 1 year.
 - d. 18 months.
11. The beneficiary of a second trust deed would be *MOST* likely to insist on a
 - a. subordination clause.
 - b. request for notification of default.
 - c. subrogation clause.
 - d. financing statement.
12. A junior lienholder was worried that a prior lienholder would delay foreclosure until the amount owed was so great that redemption by the junior lienholder would be difficult. To protect against this situation, the junior lienholder should record a
 - a. request for notice of default.
 - b. request for notice of delinquency.
 - c. notice of nonresponsibility.
 - d. lis pendens.

13. A financing instrument whereby the seller retains the legal title is a
 - a. trust deed.
 - b. mortgage.
 - c. real property sales contract.
 - d. subordination agreement.
14. Which element need *NOT* be included in a real property sales contract?
 - a. The number of years required to pay it off
 - b. A legal description
 - c. A subordination agreement
 - d. The basis for tax payments when taxes are included
15. A dragnet clause in a trust deed covers
 - a. any contingency.
 - b. future advances.
 - c. additional parties.
 - d. increases in the interest rate.
16. A subordinate loan that includes the amount of other loans is known as a(n)
 - a. purchase money loan.
 - b. wraparound loan.
 - c. open-end loan.
 - d. usurious loan.
17. Seller financing disclosure requires that the broker disclose
 - a. whether the purchaser will receive cash from the transaction.
 - b. the date and amount of any balloon payment.
 - c. both of these.
 - d. neither of these.
18. A subordination clause in a trust deed is of greatest benefit to the
 - a. trustor.
 - b. beneficiary.
 - c. trustee.
 - d. tenant.
19. The Servicemembers Civil Relief Act of 2003 protects citizen soldiers by
 - a. limiting credit obligations entered into before active duty to 5%.
 - b. allowing courts to stay foreclosure for up to two years after active service ends.
 - c. allowing service personal to terminate residential leases if transferred.
 - d. prohibiting any eviction of a service member's family while the service member is on active duty.

20. A financing statement is removed from the records by
 - a. final payment of the debt.
 - b. a reconveyance deed.
 - c. a notice of abandonment.
 - d. the filing of a termination statement.
21. Which is *TRUE* of beneficiary statements?
 - a. There can be a charge by the beneficiary.
 - b. Failure to provide a statement within 21 days of request could result in a \$300 penalty.
 - c. Both of these are true.
 - d. Neither of these is true.
22. RESPA disclosure is the responsibility of the
 - a. lender.
 - b. broker.
 - c. escrow holder.
 - d. title insurer.
23. A lender can properly refuse to grant a loan to a borrower based on
 - a. the high rate of loan defaults in the area.
 - b. the borrower's public assistance income.
 - c. the fact that the borrower is a single person.
 - d. none of these.
24. The Truth in Lending Act (Regulation Z) requires that the lender provide the borrower with
 - a. the annual percentage rate.
 - b. the finance charges.
 - c. the taxes.
 - d. both a and b.
25. The Truth in Lending Act (Regulation Z) provides that a borrower under a contract that places a lien on his residence has a period of rescission of
 - a. 24 hours.
 - b. 3 business days.
 - c. 48 hours.
 - d. 30 days.

11

UNIT ELEVEN



INVOLUNTARY LIENS AND HOMESTEADS

KEY TERMS

abstract of judgment	homestead	preliminary notice
ad valorem taxes	homestead exemption	specific liens
affirmation	judgment lien	stop notice
attachment	mechanics' liens	tax liens
cessation of work	notice of cessation	verification
declaration of homestead	notice of completion	writ of execution
general lien	notice of nonresponsibility	

INVOLUNTARY LIENS

Involuntary liens are liens against real property that are imposed by the law, as opposed to voluntary liens, such as trust deeds, which are the result of agreement. Liens are a charge against real property, and real property can be foreclosed to satisfy liens.

Judgment Liens

A judgment is a final order of a court. A court's declaration that money is owed does not in itself create a **judgment lien** against the debtor's property. Recording a certified abstract of the court's judgment with the county recorder creates a **general lien** on all the debtor's nonexempt real property within the county where the judgment is recorded. Certified copies of the **abstract of judgment** might be recorded in additional counties where the debtor has property. An unrecorded judgment or a judgment filed in the wrong county does not create a lien on the debtor's property.

Recording an instrument generally gives it priority over prior unrecorded conveyances and liens. Civil Code Section 1214, which gives this priority, requires that the later conveyance be made in good faith (without notice of the prior conveyance) and for valuable consideration. Judgment creditors are not considered to be bona fide purchasers or encumbrance holders (*Wells Fargo Bank v. PAL Investments Inc.* (1979) 96 C.A.3d 431). Therefore, a recorded judgment lien would not take priority over a prior unrecorded deed or trust deed given for value.

Judgment liens are good for 10 years from the entry of the judgment. Judgment liens based on alimony or child support are good for 10 years from the date of recording.

Judgment liens apply to property owned by the debtor at the time the judgment is recorded, as well as to postjudgment property acquisitions. While the priority of judgments ordinarily is based on the time of recording, all existing judgments have equal priority as to after-acquired property. A judgment lien applying to after-acquired property is secondary to any purchase money liens against the property.

Termination of Judgment Liens

Judgment liens can be terminated by the following events:

- Expiration of 10 years: The statute of limitations would preclude any action for collection after that period. However, a judgment can be extended for an additional 10 years by again recording the abstract of judgment.
- Discharge of the debt in bankruptcy (Debts based on fraud of debtor will not be discharged.)
- Payment and satisfaction: When the debtor has paid, the judgment creditor must give a satisfaction of the judgment within 15 days of demand or be subject to a \$250 penalty, as well as actual damages. When recorded, the satisfaction releases the lien. Because a judgment is a general lien against all of the debtor's property, a creditor might agree to release a particular property from the general lien in consideration of a partial payment. Because a judgment can be appealed to a higher court, judgment creditors often will agree to accept a lesser sum to satisfy a judgment so as to avoid the risk, time, and expense of an appeal. The judgment creditor also could give a satisfaction without consideration. This would be a gift.

When a debtor has no property, the lien's only value would be against possible future acquisitions. Before commencing a costly lawsuit, creditors ordinarily seek to ascertain whether a resulting judgment will likely be collectible at present or in the future.

Writ of execution A judgment creditor, after locating and identifying property of the debtor, can obtain a writ from the court directing the sheriff to seize and sell the debtor's property to satisfy the judgment. This **writ of execution** is a separate lien on the debtor's property for a period of one year.

The judgment creditor who levies execution is given priority over other judgment creditors.

Before any sale, the court will hold a hearing at which the debtor will have an opportunity to show why an execution sale should not take place.

When the execution applies to a homesteaded dwelling (discussed later in this unit), the court will determine the value of the property. The executing creditor can force a sale only if the homeowner's equity exceeds the statutory homeowner's exemption. The property will not be sold unless the bid received is at least equal to an amount that will pay off all liens plus the amount of the homestead exemption and the lien of the judgment creditor enforcing the execution sale. If the highest bid is insufficient, the sale will not be approved, and the judgment creditor will not be able to subject the property to another sale for at least one year.

CASE STUDY The case of *Little v. Community Bank* (1992) 234 C.A.3d 355 involved a sheriff's sale of homesteaded property. After the sale, the purchaser discovered three IRS liens against the property that had not been listed on the title report relied on by Community Bank in obtaining court approval for the sale. The purchaser, Little, paid the IRS \$125,882.94 and sued Community Bank for negligence. The Court of Appeal noted that a sheriff's sale to satisfy a judgment debt can be approved only if (1) the sale proceeds are 90% or more of the property value and (2) the sum exceeds the homestead exemption plus any extra amount needed to satisfy all liens. The court ruled that Community Bank was negligent in not discovering the IRS liens before the sale and was liable to Little, who was entitled to a clear title.

The validity of a homestead can be attacked by the judgment creditor. If the homestead declarant did not actually reside on the property or had no actual interest in the property at the time of filing, the homestead will not be valid.

A judgment by itself is not a lien on a homesteaded property. The lien does not attach until levy of execution takes place (Code of Civil Procedure Section 704.950).

Notice of execution sale Notice of an execution sale must be given by

- posting notice of the sale on the property for 20 days before the sale,
- publishing notice of the sale once a week for 20 days in a newspaper of general circulation within the county where the property is located, and
- mailing notice to anyone who requests notification from the clerk of the court.

The execution sale The sale must be made at public auction by sheriff's sale in the county where the property is located on a business day between 9:00 am and 5:00 pm.

The purchaser at the sale receives a certificate of sale.

Redemption rights The debtor is allowed to redeem the property from an execution sale within 12 months of the sale (three months if the indebtedness was paid in full by the sale proceeds). The debtor can assign the redemption rights to a third party.

To redeem, the debtor (or assignee) must pay the sales price plus statutory interest, plus taxes, insurance, repairs, and maintenance that were reasonably necessary for the property.

Another judgment creditor also can redeem, but their redemption still will be subject to the redemption rights of the debtor.

A sheriff's deed will be issued to the purchaser if a redemption does not occur within the 12-month period. The purchaser will get no greater interest than the debtor had, so the property could be subject to trust deeds, tax liens, easements, et cetera.

Section 701.680 of the Code of Civil Procedure provides that an action to set aside the sale must be made within 90 days (if the purchaser is a judgment creditor).

Attachment

Attachment is a process by which real or personal property of a defendant in a lawsuit is seized and kept in the custody of the law to satisfy a judgment that the plaintiff hopes to obtain. The attachment is a prejudgment seizure while a case is pending that ensures the availability of property for execution after a judgment is rendered. One effect of an attachment action is that it can expedite the settlement of claims.

Attachment is now limited to claims arising from the conduct of a business, trade, or profession. Because attachment is based on the theory that only the amount of the debt, not its existence, is in dispute, attachments are limited to actions arising out of express or implied contracts requiring the payment of money.

The attachment lien is in force for three years from the date of levy. The court can extend an attachment lien for an additional two years. The lien can be released by court order, by order of the plaintiff, or by the levying officer.

There is no right of sale with an attachment lien. A sale must be made under an execution after a judgment has been rendered.

Before an attachment, a hearing must be held. Property cannot be taken without due process (*Randone v. Appellate Dept.* (1971) 5 C.3d 536). Before a hearing, the court can issue a temporary restraining order to prohibit the sale of the property.

To obtain an attachment, the plaintiff will have to convince the court that it is needed to protect the plaintiff's interests and that the claims of the plaintiff are likely to be valid.

The court will allow the defendant to post a bond or make a deposit rather than have the property attached; similarly, the court might require the plaintiff to post a bond as a condition to obtain a prejudgment writ of attachment.

The attachment lien will be lost if the defendant prevails in the lawsuit. If the plaintiff obtains a judgment, the attachment lien merges with the judgment lien as of the date of attachment for priority purposes, which would give the creditor priority over liens that otherwise could have priority.

Homeowners Association Liens

Homeowners associations can file liens for unpaid assessments. Assessments that exceed \$1,800 and have been delinquent for over one year can be foreclosed. The foreclosure sale is subject to a 90-day right of redemption.

Real Property Taxes and Assessments

Property taxes are **ad valorem taxes** in that they are based on property value. Assessments are costs associated with an improvement that benefits a property, such as paving a street.

Proposition 13, enacted in 1978, provides that the assessed value of real estate be based on the 1975 tax rolls. Property is reassessed upon a purchase by a new owner or other changes of ownership. Changes of ownership that do not trigger reassessment are

- property passing to a surviving spouse or registered domestic partner;
- transfers to children by sale, gift, or inheritance of a parent's principal residence; and
- transfers to children by sale, gift, or inheritance of property other than a principal residence (limited to \$1,000,000 in assessed valuation to be excluded from reassessment).

As opposed to general liens, which apply to all of a debtor's property in the county where recorded, liens for property taxes and special assessments are **specific liens** attaching to the particular property on which they are due. Special assessments are for public improvements benefiting the property, such as water, sewers, streets, curbs and gutters, etc.

Property **tax liens** and assessment liens have equal priority and take priority over all other liens, regardless of purpose or when recorded. Because they are priority liens, a tax sale would wipe out not only junior encumbrances but also purchase money first trust deeds and mechanics' liens.

Real property tax rates are determined on or before September 1. One-half of the tax is due on November 1 and delinquent at 5:00 pm on December 10. The other half is due on February 1 and delinquent at 5:00 pm on April 10.

Real property on which taxes are delinquent goes on the tax-defaulted property rolls after June 30, at which time a five-year redemption begins. (For commercial property, the redemption period is three years.) If the property is not redeemed within the five-year period, the tax collector can sell the property to taxing agencies, revenue districts, certain nonprofit organizations, or anyone at public auction. The tax collector must attempt to sell the property within two years. However, as long as the state retains title, the former owner's redemption rights continue. The property may not be sold for less than 50% of its market value. The minimum bid must be approved by the board of supervisors. The purchaser at a tax sale receives a tax deed.

Low-income senior citizens (62 years of age and older) and disabled people can defer payment of taxes on their residence, in which case the state takes a lien on the property and recovers the taxes plus interest when the owners die or sell the residence.

Federal and State Tax Liens

Liens for federal income tax are general liens and arise when the taxpayer refuses to pay a tax assessment. To have any effect against purchasers or other lienholders, the lien must be recorded.

Liens for state taxes are general liens on all property within the state. Recording is required to establish priority over subsequent liens.

Mechanics' Liens

Mechanics' liens are specific statutory liens, but they are provided on the basis of equity. That is, improvers of property should have a charge against the property for the value of their improvements; otherwise, owners could receive undeserved enrichment. Mechanics' lien rights are set forth in the California State Constitution (Article XIV, Section 3).

Mechanics' liens are specific liens; they apply only to the property for which labor, material, or services were provided. They play an important role in both construction law and consumer law.

People of every class who perform labor, bestow services, or furnish material or equipment that contributes to the construction of, alteration of, addition to, or repair of any building or other structure or work of improvement can file mechanics' liens against the real property. Grading, landscaping, and demolition are included in this definition. Mechanics' liens may not, however, be filed against work contracted for by a public entity (a public work).

Generally, mechanics' liens result when the owner has contracted for services directly or through an architect, general contractor, or subcontractor (regarded as agents of the owner for the purpose of the lien law). A direct privity of contract or even knowledge by the owner of the specific mechanic is not necessary for a mechanic to have lien rights. In California, workers can file a lien even when their own employer does not file a lien. An unlicensed contractor, however, cannot file a mechanic's lien.

There is an exception in cases where an unlicensed worker performs contracting work, the total price is less than \$500, and the owner was made aware that the contractor was not licensed.

CASE STUDY The case of *MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works, Inc.* (2005) 36 C.A. 4th 412 involved failure to have the proper contractor's license. MW Erectors did not have a structural steel contractors' license at the time a contract was entered into with a subcontractor of Disney Corporation, Niederhauser. Anthony Niederhauser was paid by Disney. They refused to pay MW because MW was not licensed before entering the contracts. There were two contracts, one for structural steel work (\$955,552.89) and one for ornamental work (\$366,694). Work on the structural steel contract began on December 3, 1999, but the contractor was not licensed until December 21, 1999. The work on the ornamental steel contract began after MW was licensed, but MW was not licensed at the time the contract was entered into. The Business and Professions Code requires that a contractor be licensed at all times during performance of the contract.

After a superior court summary judgment in favor of the defendant, MW appealed. The Court of Appeals reversed the decision and Niederhauser appealed to the California Supreme Court.

The Supreme Court ruled that B&PC Section 70316 bars MW from recovery if it were unlicensed at any time during performance of the work. (The doctrine of substantial performance does not apply.) Therefore, MW could not recover for the structural steel contract. However, MW was not barred from recovery for the ornamental steel work (\$366,699) because MW was licensed during performance.

Apparently, if any work is done while a contractor is unlicensed, the contractor is barred from recovery for the entire contract.

The decision, while strictly in accordance with the law, seems unjust in that Niederhauser, which was paid in full by Disney, ended up with a windfall of \$955,553.

Even when an unlicensed contractor performs the work because of fraudulent representations of the owner, the unlicensed contractor cannot sue in California courts for money owed.

Not only is the unlicensed contractor unable to sue for the contract price, a person who paid an unlicensed contractor may sue for recovery of amounts paid (Business and Professions Code Section 7031).

There is an exception to the prohibition against an unlicensed contractor being able to sue for monies owed. The defense is of substantial compliance. A contractor must prove

- the contractor was licensed before work commenced,
- the contractor acted reasonably and in good faith to maintain licensure, and
- the contractor acted promptly and in good faith to reinstate licensing upon learning it was invalid.

CASE STUDY *Hydrotech Systems v. Oasis Waterpark* (1991) 52 C.3d 988 involved a New York corporation hired as a subcontractor to install surfing pool equipment for a price of \$850,000. The water park knew that Hydrotech Systems was not a licensed California contractor but induced the company to do the work because of its expertise. Hydrotech sued for the \$110,000 balance owed, and the defense raised was that Hydrotech was not a licensed contractor. Hydrotech amended its complaint, alleging fraud. The California Supreme Court pointed out that an unlicensed contractor cannot sue in California courts for any act requiring a contractor's license (Business and Professions Code Section 7031). The court refused to allow any exceptions for fraud or any other reason.

CASE STUDY *Twentynine Palms Enterprises Corporation v. Bardos* (2012) 210 C.A. 4th 1435 involved an unlicensed contractor, Cadmus Construction Company, being paid \$751,995 for building a parking lot at an Indian casino. When the plaintiff realized Cadmus was unlicensed, it sued for return of monies paid. The contractor took the position that licensing was not required because the tribe had taken the position that as a sovereign nation, California licensing and regulatory law did not apply to them.

The Court of Appeal upheld the trial court ruling that the money paid to the contractor had to be returned to the tribe and that while the tribe could claim immunity from state laws and regulations, a third party could not do so.

Note: The work was completed and no question was raised as to the performance of the contractor. While Bardos, the owner of Cadmus, was not licensed as a contractor personally or through Cadmus, another entity he controlled, Bardos Construction, Inc., was licensed. If the contract had been with Bardos Construction, Inc., then there would have been no problem.

While this case clearly indicates the plaintiff was unjustly enriched, the law is clear that licensing is paramount to compensation.

While a contractor must be licensed to file a lien, an employee need not be. The person claiming to be an employee would have the burden to prove that he was not an unlicensed contractor.

To avoid workers' compensation, Social Security contributions, and tax withholding, contracts will sometimes state that a person is an independent contractor and not an employee. Such a contract, by itself, would not disqualify an unlicensed employee from filing a mechanic's lien.

CASE STUDY In the case of *Sanders Construction Co. v. Cerda* (2009) 175 C.A. 4th 430, an unlicensed drywall contractor failed to pay workers who filed claims with the state labor commission. The prime contractor was ordered to pay the wages. He appealed and the superior court affirmed the award of wages.

The Court of Appeal affirmed, holding that a general contractor is liable for unpaid wages of unlicensed subcontractors.

CASE STUDY In the case of *White v. Cridlebaugh* (2009) 175 C.A. 4th 1535, the responsible licensed contractor manager was in Peru, and the unlicensed manager in charge signed a contract on behalf of the contractor to build a log home. The homeowner sued the contractor for negligent breach of contract, and the contractor sued for \$14,000, which was allegedly still owed.

The trial judge dismissed the contractor claims because the contractor's license was legally suspended and so there was no licensed contractor. The trial judge also awarded the homeowner \$84,000, which was the amount paid by the homeowner. The trial judge then reversed itself on the \$84,000 award.

The Court of Appeal reinstated the \$84,000 award, citing the importance of deterring violations of the contractor law.

(Business and Professions Code 7031(b) provides that the homeowner can recover all monies paid to an unlicensed contractor and the amount is not subject to any offset for the value of the work done even if it adds to the value of the property.)

Note: This case points out the importance of having the licensed contractor physically available.

Notice of Nonresponsibility

A mechanic's lien also can arise if the property owners discover unauthorized work being done on their property and fail to give notice that they will not be responsible for the work. The most common situations are work authorized by tenants or vendees under real property sales contracts. There is often a notice of nonresponsibility posted on stores in shopping centers to protect the owner of the center from liens should the lessee fail to pay contractors.

Within 10 days of obtaining knowledge of an actual commencement of work, the owner must post a **notice of nonresponsibility** on the property in a conspicuous place and record a verified copy. Failure to verify has been held to not be a fatal defect (*Baker v. Hubbard* (1980) 101 C.A.3d 226). Even if a notice is recorded properly, it is ineffective unless it also is posted. If the notice is posted and recorded properly, the owner's interest cannot be liened.

The notice of nonresponsibility must contain

- a property description,
- the name of the person giving notice and the nature of that person's interest,
- the name of the vendee under the contract or tenant, and
- a statement that the person signing will not be obligated.

While a vendor under a real property sales contract must file a notice of nonresponsibility to be protected against mechanics' liens, the beneficiary under a trust deed need not post or record notice because any mechanics' liens would be subject to prior interest.

If a vendor under a real property sales contract or a lessor under a lease requires the vendee or the lessee to make repairs, improvements, or alterations as a condition of the contract or lease, a notice of nonresponsibility will not offer protection from mechanics' liens.

CASE STUDY In the case of *Los Banos Gravel Company v. Freeman* (1976) 58 C.A.3d 785, a lease required the lessee to construct a service station and a restaurant. Rent was to be based on the gross receipts. The lessor posted a notice of nonresponsibility. The court held that because the property owners were participating with the lessee in the construction of the premises, they were precluded from exempting the property from mechanics' liens by the filing and posting of a notice of nonresponsibility.

Preliminary notice To prevent secret liens or lien claimants, a **preliminary notice** must be given before the recording of a mechanic's lien. To fully protect lien rights, the mechanic should file a preliminary notice that the work is subject to lien rights within 20 days of starting work. If the notice is given later, any subsequent liens will cover only the work starting 20 days before filing.

The preliminary notice may be served in person or by first-class, registered, or certified mail. It must be sent to the owner, the construction lender, and the prime contractor. If the owner contracted directly with the party filing, no notice need be served on the owner. The lender's copy must contain an estimate of the total price of labor, services, and/or material to be furnished.

The preliminary notice must contain

- material to be furnished;
- the name and address of the potential claimant and the name and address of the person who contracted for the purchase of labor, service, equipment, or material;
- a description of the job site; and
- a statement that if the bills are not paid in full, the improved property may be subject to a mechanic's lien.

Period to file a lien A recorded notice filed by an owner that work has been completed, known as a **notice of completion**, sets the exact time of completion. Completion can also be either occupation by the owner or the owner's agent coupled with cessation of labor or acceptance of the work by the owner or the owner's agent. If no notice of completion is filed, any lien claimants can file their liens within 90 days of the actual completion of work.

If a notice of completion has been filed, all claimants other than the original contractor have 30 days to file their liens. The original contractor (prime contractor) has 60 days after the recording of the notice of completion to file a lien. The notice of completion must be filed within 10 days of completion of work.

Cessation of work If work is stopped and no **notice of cessation** is filed, all lien claimants have 90 days from **cessation of work** to file their liens. Cessation is defined as 60 continuous days without any work being conducted.

If a notice of cessation is filed, all contractors other than the prime contractor have 30 days to file their liens, and the prime contractor has 60 days (the same as for notice of completion).

An owner who files a notice of completion or cessation must notify the original contractor and any subcontractor who has filed a 20-day preliminary notice, within 10 days of recording the notice. Failure to do so would extend the period to file a lien to 90 days.

Figure 11.1 illustrates the time frame for filing mechanics' liens.

FIGURE 11.1: Time Frame for Filing a Mechanic's Lien

TIME FRAME FOR FILING A MECHANIC'S LIEN

- Preliminary notice – within 20 days of starting work to be fully covered
- Period for filing lien
- Notice of completion filed
 - Original contractor has 60 days
 - Subcontractors have 30 days
- Notice of cessation file
 - Original contractor has 60 days
 - Subcontractors have 30 days
- No notice filed (completion or cessation)
 - All contractors have 90 days

Recording mechanics' liens Liens must be verified to be recorded. **Verification** is provided by the mechanic, who swears to the truthfulness of the facts stated. If for religious reasons a mechanic cannot make a public oath, the mechanic will make an **affirmation**, which is a formal declaration that a statement is true. The lien also must

- describe the work of the claimant,
- describe the property covered by the lien,
- state who hired the claimant,
- list the name of the owner or person claiming ownership,
- include the balance due (an intentional overstatement can invalidate the lien), and
- allege that the claimant was licensed at all times during her performance.

Enforcing mechanics' liens Mechanics' liens are enforced through a foreclosure action brought by the lienholder. If they are not satisfied, the property will be sold. The redemption rights from the sale are similar to those in a mortgage foreclosure.

Priority of mechanics' liens All mechanics' liens have equal priority and relate as a whole back to the date on which work actually commenced on the project. When each mechanic started or completed work makes no difference. For the starting time, some work must be apparent to anyone who checks the property. In *Simons Brick Company v. Hitzel* (1925) 72 C.A. 1, the court held that starting time was indicated by "some work and labor on the ground, the effects of which are apparent, easily seen by everyone, such as beginning to dig the foundation, or work of like description that everyone readily can see and recognize as the commencement of a building."

Mechanics' liens, after filing, have priority over other liens attached subsequent to the time of commencement of work. Mechanics' liens also have priority over prior liens that were unrecorded at the time of commencement of work.

The holder of a subsequent mortgage or trust deed can obtain priority over mechanics' liens by posting a bond of not less than 75% of the amount of the mortgage or trust deed. The purpose of the bond is to pay judgments in suits to foreclose on mechanics' liens.

Termination of mechanics' liens Mechanics' liens are lost if no action is taken to enforce them within 90 days of filing. The failure to start action or to file a lien extinguishes only lien rights, not the debt.

If a lienholder fails to commence an action to enforce a mechanic's lien within 90 days, the property owner can petition the court to remove the lien and may recover up to \$2,000 for attorney fees.

Mechanics' liens could be wiped out by a priority lien foreclosing; for example, a trust deed that was recorded before the commencement of work.

An owner can get a mechanic's lien released by filing a surety bond of 1½ times the amount of the lien claimed. This is common when an amount due is in dispute.

A tender of full and proper payment that is refused by the mechanic will serve to release the lien. (The debt will still exist.)

Voluntary release of a lien terminates the lien (usually after payment of the debt). A judicial sale also terminates the lien.

Stop notice This is a notice to a lender or an owner that a mechanic claimant has not been paid. It is served on the parties (not recorded). To serve a stop notice, the mechanic first must have filed a preliminary notice.

A **stop notice** is a lien on the balance of the funds the lender is holding. It has priority over the lender's use of the funds remaining for completion. While a mechanic's lien could be wiped out by a lender's foreclosing, a stop notice protects the mechanic with a lien on the unexpended funds.

Upon receipt of a stop notice, the lender must withhold monies due or to become due in the amount of the claim. If the owner, lender, or prime contractor disputes the validity of the stop notice, a bond in the amount of 125% of the amount claimed can be posted; the funds then would be released from the lien.

Lis Pendens

As previously stated, a lis pendens is a notice of a pending lawsuit involving rights concerning real property. When recorded, it is notice to anyone to examine the proceedings because title is in litigation. Any purchaser after the filing takes subject to the adverse claims; however, a lis pendens has no effect on any prior interests.

A lis pendens, while not a lien, protects claimants from a transfer of property that could affect their interests. Wrongfully recording a lis pendens could subject the recording party to damages for slander of title.

Before a lis pendens can be recorded, it must be signed by an attorney or approved by a judge, and all adverse parties must be served with notice. A lis pendens can be expunged (removed from the record) if a court finds that the claimant has not established by a preponderance of evidence the probable validity of the claim.

DECLARATION OF HOMESTEAD

Article XX, Section 1.5, of the California Constitution provides for homestead rights. The purpose of a **homestead** is to provide a home free from the fear and anxiety that it will be lost to creditors. A **declaration of homestead** may be recorded by an owner (or lessee under a lease for 30 years or more) to protect the homesteaded property from execution by subsequent judgment creditors.

CASE STUDY In the case of *Palmer v. Zaklama* (2003) 109 C.A.4th 1367, Mr. and Mrs. Zaklama, both physicians, purchased a home in 1984. In 1989, they moved to New Jersey but hired a property management firm. When the Zaklamas refused to pay for repairs made, the management firm sued and obtained a \$9,000 judgment against the house. Execution of the judgment resulted in a sale to the plaintiffs for \$10,000, subject to an existing loan. When the Zaklamas learned of the sheriff's sale, they filed a lis pendens, which prevented the buyers from selling the property. They also moved into the house without permission and were arrested and removed by the police. The Zaklamas sued, alleging the buyers were in "cahoots" with the property management firm and the sheriff to acquire title. After the civil suit, the lis pendens was expunged in July 1995.

The foreclosure-sale buyers then sued the Zaklamas for malicious prosecution, abuse of process, and slander of title to recover their losses suffered during the four-year period when the lis pendens prevented them from selling or refinancing the house. The superior court found Esmat Zaklama liable for \$235,463 in compensatory damages plus \$125,000 punitive damages. Selvia Zaklama was found liable for \$235,463 in compensatory damages.

The Court of Appeal affirmed, ruling that slander of title and malicious prosecution are the proper legal remedies for wrongful recordation of a lis pendens. The showing of good faith and a proper purpose are not sufficient for filing a lis pendens. The claimant must also show a probable valid claim. Note that Civil Code Section 701.680(a) makes a sheriff's sale absolute and it cannot be set aside for any reason unless the purchaser at the sale was the judgment creditor.

A homestead declaration does not protect an owner from voluntary liens, such as trust deeds or from tax liens, mechanics' liens, or homeowners association assessments. It also does not protect the homesteaded property against judgment creditors whose liens were perfected by recording of the abstract of judgment before the recording of the homestead.

To file a homestead declaration, the person recording must reside on the property homesteaded. Actual title is not necessary. Besides a lessee on a lease for 30 years or more, a buyer on a real property sales contract also can file a homestead declaration. A homestead can be filed on any property used as a residence (single-family dwelling, apartment building, farm, condominium, cooperative, mobile home, boat, etc.).

The **homestead exemption** is the greater of

- \$300,000, or
- the median sales price for a single-family home in the county for the prior year, with a maximum of \$600,000.

The exemption amount is adjusted annually for inflation.

CASE STUDY In the matter of *In re Rabin* (2006) 336 B. R. 459, the U.S. Bankruptcy Court ruled that registered domestic partners qualify for one \$75,000 head of household homestead exemption, not two exemptions. They should be treated the same as married couples because the Domestic Partners Act gives registered domestic partners the same rights and duties of spouses, except for filing joint income tax returns.

Note: The \$75,000 family unit is now \$100,000.

The homestead exemption is available in bankruptcy even though a homestead declaration was not filed.

CASE STUDY In the case of *In re Howell* (1980) 638 F.2d 81, a father who lived with his 23-year-old unemployed son, who was dependent on the father for support, qualified as a family unit for the homestead exemption.

The homestead exemption applies to an owner's equity. If a home had a fair market value of \$100,000 and a \$10,000 trust deed against it, the homeowner's equity would be \$90,000. The homestead exemption would be \$300,000. Subsequent judgment creditors could not force the sale of the property because the homestead exemption exceeds the owner's equity. Creditors can force a sale if the debtor's equity exceeds the homestead exemption.

The proceeds from a creditor's sale of homesteaded property first go to pay off the secured liens (\$10,000 first trust deed). Next, the owner receives the amount of the exemption—in this case, \$300,000—in cash, and the balance, after deducting sale costs, goes to the creditors. The owner has six months to change the cash proceeds into another homesteaded property (the cash cannot be reached by creditors during this period).

Similarly, if the homestead is destroyed by fire, the proceeds of the insurance are exempt from creditors' claims for six months. In either case, the money can be reinvested in a new dwelling and a new homestead declaration can be filed.

When the owner's equity would allow a sale, the court can partition the property to create a smaller protected homestead. For example, a farm home and a few acres can be partitioned from the balance of the property.

If a married couple own separate interests as their separate property, each spouse can file a separate homestead declaration, but their combined exemption cannot exceed that of a family unit.

Either spouse can file a valid homestead on property jointly owned by both spouses. While one spouse formerly could file a declaration of homestead on property separately owned by the other spouse, after July 1, 1983, this was no longer possible. Code of Civil Procedure Section 704.910(b)(1) requires an ownership interest to file a homestead declaration.

Unmarried parties who have an ownership in the same dwelling can file separate homestead exemptions.

Section 6520 of the Probate Code provides that if no homestead property is selected during life, a court can select a probate homestead for the spouse and minor children. This homestead would be effective against the creditors in probate. This homestead protection is limited to the lifetime of the spouse.

When a homesteaded property is sold and a new one is purchased immediately, the new homestead rights take priority as of the date of the prior homestead declaration.

To be valid, a declaration of homestead must be recorded in the county where the property is located. A homestead is not valid unless it is acknowledged. However, Civil Code Section 1207 provides that a recorded instrument that is otherwise valid gives constructive notice after it has been recorded for one year, notwithstanding any defect in or omission of an acknowledgment.

A declaration of homestead must include the following:

- The name of the declared homestead owner (can be both spouses if each owns an interest)
- A description of the declared homestead
- A statement that the property is the principal dwelling of the homestead owner and that the homestead owner is residing in the declared homestead at the time the homestead is recorded

CASE STUDY In the case of *Skinner v. Hall* (1886) 69 C. 195, an owner had rented out his house. He leased one room back from his tenant, where he slept for one night. (His family did not join him.) He then filed his declaration of homestead. The court in this case held that one may file a homestead after residing for one day, a month, or a year. It held that one can have a residency even when one's family resides elsewhere and even in property partially rented out.

A person may have more than one homestead but only one at a time. To terminate a homestead, the owner must either sell the property or file a declaration of abandonment. Moving from the property does not end the homestead.

If a person files a homestead while heavily in debt, creditors may become very nervous. Filing a homestead at the time of purchase generally will not have a significant negative effect on credit.

SUMMARY

Involuntary liens are imposed by law, as opposed to voluntary liens, which are created by agreement. Involuntary liens include judgment liens, attachment liens, tax liens, and mechanics' liens.

Judgment liens are general liens against all of the property of the debtor in the county where the abstract of judgment is recorded. A judgment creditor can obtain execution on the judgment, in which case the sheriff seizes and sells the property. The purchaser at the sale receives a certificate of sale. If the debtor fails to redeem the property within 12 months of the sale, the purchaser will receive a sheriff's deed.

An attachment is a prejudgment lien to ensure the availability of property for execution if a judgment is rendered. The attachment is a lien against real property for three years from the date of levy. A hearing must be held, and the court will grant an attachment only if it believes it is necessary to protect the creditor and that the creditor's claim is valid. The defendant can post a bond in lieu of the attachment; an attachment would tie up the property.

Liens for real property taxes and special assessments are specific priority liens. A tax sale will wipe out trust deeds and mechanics' liens.

Federal and state tax liens are general liens, and recording determines their priority.

Mechanics' liens are specific statutory liens for the value of improvements by a contractor, subcontractor, equipment and material supplier, or laborer. An unlicensed contractor cannot file a mechanic's lien.

Before filing a lien, a mechanic who does not have a direct contract with the owner must provide a preliminary notice that the work is subject to a lien. The notice covers work subsequent to the notice and up to 20 days before the notice.

If no notice of completion is filed, all mechanics have 90 days after work stops on the project to file their liens. If a notice of completion is filed, subcontractors have 30 days to file and the prime contractor has 60 days. Within 90 days of filing a mechanic's lien, action must be brought under the lien to foreclose the property, or the lien will be lost. A homeowner, or a lessor on a lease for 30 years or more, can record a declaration of homestead, which provides protection against subsequent judgment creditors in the greater of the following amounts:

- Single person: \$300,000
- The median sales price for a single-family home for the county in the prior year (amount is adjusted annually for inflation)

To file a homestead declaration, the person must live there at the time of filing. To terminate a homestead, the owner must either file a declaration of abandonment or sell the property.

DISCUSSION CASES

1. A building corporation also owned a lumberyard. The building corporation sought to foreclose on its own property because the lumber had not been paid for. Why would a company want to foreclose on its own property? **What was the court's probable reaction to this action?**

Superior Lumber Co. v. Sutro (1979) 92 C.A.3d 954

2. An owner leased property to a convalescent hospital. After the lease was entered into, it was discovered that a great deal of work would be required if the property were to be approved and used for a convalescent home. The owner refused to pay for the work. The tenant authorized the work. The owner filed a notice of nonresponsibility. **Should the property be subject to a mechanic's lien?**

Baker v. Hubbard (1980) 101 C.A.3d 226

3. A broker furnished trucks, drivers, and equipment for excavating and grading. The broker was not the owner of the equipment provided. **Is the broker entitled to a mechanic's lien?**

Contractors Dump Truck Service Inc. v. Gregg Construction Co. (1965) 237 C.A.2d 1

4. **Should a mechanic be allowed to foreclose on valuable property when the lien is for a relatively insignificant amount?**

Robinett v. Brown (1914) 167 C. 735

5. A spouse contracted for work on the separate property of the other spouse. **Is the other spouse liable for the work?**

Loviet v. Seyfarth (1972) 22 C.A.3d 841

6. After an attachment lien but before a judgment was recorded, a property owner filed a declaration of homestead. **Does the declaration of homestead take priority over the attachment and judgment liens?**

Becker v. Lindsay (1976) 16 C.3d 188

7. A contractor abandoned a job before the work was substantially completed in accordance with the plans and specifications. The contractor filed a mechanic's lien for the value of material and services he had rendered. **Was the lien proper?**

Marchant v. Hayes (1897) 117 C. 669

8. Before filing voluntary bankruptcy, a debtor conveyed her homesteaded property to her daughter for no consideration. **What are the rights of the creditors?**

Gardner v. Johnson (1952) 195 F.2d 717

9. A judgment was entered for child support. After the judgment, the father was absent from the state for most of the time. Twenty-two years later, the wife sought execution of the judgment. **Was she entitled to execution?**

Nutt v. Nutt (1966) 247 C.A.2d 166

10. An engineering firm made aerial topographic maps and studies of a property for a proposed subdivision. It placed engineering stakes and aerial markers on the property. While they could be seen from the air or by walking the property, they could not be seen from the street because of weeds. The engineering firm claimed priority over a loan because of a priority in staking the property and placing the markers. **Does the engineering work constitute commencement of work in terms of the priority of mechanics' liens?**

South Bay Engineering Corp. v. Citizens Sav. & Loan Assn. (1975) 51 C.A.3d 453

11. At the time a landscaper started a job, he was not licensed. In April 2007, the landscaper obtained a license. The homeowner sued for return of \$57,500 paid to the landscaper by May 2007. The landscaper appealed a judgment in favor of the homeowner, asserting that the homeowner knew he was unlicensed when the job started and that \$20,000 covered materials that the homeowner retained. **What will the Court of Appeal decide?**

Alatraste v. Cesar's Exterior Designs (2010) 183 C.A. 4th 656

12. A contractor's license was for "Clark Heating and Air Conditioning" but a contract was signed "Clark Air Conditioning and Heating" **Was the contractor entitled to enforce a mechanic's lien?**

Ball v. Steadfast—BLK. (2011) 196 C.A. 4th 694

UNIT QUIZ

1. Involuntary liens include all *EXCEPT*
 - a. judgment liens.
 - b. tax liens.
 - c. attachment.
 - d. trust deeds.
2. Which is *NOT* a specific lien?
 - a. Property tax lien
 - b. Judgment lien
 - c. Special assessment lien
 - d. Mechanic's lien
3. Henry was injured while swimming in the pool of his neighbor Tom. Henry obtained a \$100,000 judgment against Tom. As applied to Tom's house, this would be
 - a. an unenforceable lien.
 - b. a general lien.
 - c. a specific lien.
 - d. a priority lien.
4. To create a lien after judgment, the creditor would file
 - a. a writ of attachment.
 - b. an execution of judgment.
 - c. an abstract of judgment.
 - d. none of these.
5. A judgment lien is effective
 - a. only in the county where rendered.
 - b. only in the county where the debtor resides.
 - c. in every county where it is recorded.
 - d. for 25 years from recordation.
6. Which is *TRUE* about a judgment that has been enforced by an execution sale?
 - a. The buyer receives a certificate of sale.
 - b. The former owner has a 12-month period of redemption.
 - c. The sale need not be held at the property being sold.
 - d. All of these are true.

7. Which is an example of a prejudgment lien?
 - a. Mechanic's lien
 - b. Attachment
 - c. Homestead declaration
 - d. Lis pendens
8. An attachment is a lien for
 - a. three years from the date of levy.
 - b. four years from the date of levy.
 - c. 10 years from the date of levy.
 - d. 10 years from recordation.
9. Which sequence shows the proper legal order for these events?
 - a. Execution, attachment, judgment
 - b. Judgment, execution, attachment
 - c. Attachment, execution, judgment
 - d. Attachment, judgment, execution
10. Which is *TRUE* of priority of liens?
 - a. Tax liens take priority over prior liens for special assessments.
 - b. Tax liens take priority over prior trust deeds.
 - c. Judgment liens take priority over prior mechanics' liens.
 - d. None of these is true.
11. Unpaid real estate taxes have a lien priority superior to
 - a. prior judgment liens.
 - b. prior trust deeds.
 - c. both of these.
 - d. neither of these.
12. An unpaid contractor would file which type of lien?
 - a. General
 - b. Specific
 - c. Voluntary
 - d. Attachment
13. An unlicensed person who has mechanic's lien rights would be
 - a. a general contractor.
 - b. a subcontractor.
 - c. an independent contractor.
 - d. an employee of the contractor.

14. A notice of nonresponsibility would *NOT* be filed by a
 - a. vendor under a real property sales contract.
 - b. lessor.
 - c. beneficiary of a prior recorded trust deed.
 - d. any of these.
15. A preliminary notice was filed by a contractor 40 days after work started. The period covered by a subsequent lien would start
 - a. with the notice.
 - b. 20 days before notice.
 - c. 20 days after notice.
 - d. at none of these times.
16. If there is no notice of completion, subcontractors have how many days to file their liens after completion?
 - a. 30
 - b. 60
 - c. 90
 - d. 180
17. A contractor started a foundation for a new dwelling, but the owner was not satisfied with his work and paid him off. Three weeks later, the owner got a construction loan secured by a trust deed, which was recorded. The owner proceeded to hire another contractor to build his home, and when the building was finally completed, a painting subcontractor filed a mechanic's lien against the property. What is the result in this case?
 - a. The trust deed takes priority over the mechanic's lien.
 - b. The mechanic's lien will take priority because a mechanic's lien always takes priority over a trust deed.
 - c. The subcontractor will not be able to file against the property but will be able to file a lien against the contractor's property.
 - d. The mechanic's lien will take priority over the trust deed because some work was done before the trust deed was recorded.
18. A stop notice
 - a. requires that a contractor stop work.
 - b. is a lien on construction funds held by a lender.
 - c. is equivalent to a lis pendens notice.
 - d. is none of these.

19. A notice of a pending lawsuit involving rights in a property is known as
 - a. an attachment.
 - b. a lis pendens.
 - c. an execution.
 - d. a judgment.

20. By filing a valid homestead declaration, the homeowner receives protection against
 - a. subsequent mechanics' liens.
 - b. prior judgments.
 - c. tax liens.
 - d. subsequent unsecured claims by creditors.

21. A purchaser of a condominium unit filed a declaration of homestead. The purchaser refused to pay his assessment fees, and the owners' association filed a lien. The lien would be
 - a. void because homesteaded property is protected against liens.
 - b. enforceable only if the owner's equity exceeds his homestead exemption.
 - c. collectible as if there were no homestead.
 - d. valid but collectible only when the homestead is sold.

22. A recorded abstract of judgment has priority over a homestead declaration when
 - a. it was recorded before the homestead.
 - b. the homestead is invalid.
 - c. the homestead is abandoned.
 - d. any of these occurs.

23. A declaration of homestead would *NOT* be valid if filed by
 - a. a spouse without the other spouse's permission on community property.
 - b. a tenant on a 35-year lease.
 - c. an owner of a 60-unit apartment complex.
 - d. both spouses at the start of construction of their future residence.

24. A search of the county records would always show a valid recorded
 - a. judgment lien.
 - b. mechanics' lien.
 - c. homestead.
 - d. all of these.

25. To give up a valid homestead, the owner would
 - a. change residency.
 - b. rent the premises.
 - c. change marital status.
 - d. do none of these.

12

UNIT TWELVE



ADJACENT PROPERTY RIGHTS

KEY TERMS

abatement	easement by prescription	reliction
accretion	easement in gross	right of correlative use
affirmative easement	encroachment	right of prior appropriation
avulsion	implied easement	riparian rights
doctrine of agreed boundaries	lateral support	servient tenement
dominant tenement	license	spite fence
easement	littoral rights	subjacent support
easement by estoppel	merger	trespass
easement by necessity	negative easement	
	nuisance	

BOUNDARY DISPUTES

When exact property boundaries are uncertain or in dispute, the parties involved can mutually agree to set a fixed line that is clear to both parties. According to the **doctrine of agreed boundaries**, agreed-on boundaries are binding on successors in interest after the boundary has been accepted by the parties for five years. An agreement about the placement of a wall or fence is, however, not necessarily an agreement setting the boundary lines.

In the event of an ambiguity, a boundary reference to a natural monument will prevail over angles or distances.

CASE STUDY In the case of *Armitage v. Decker* (1990) 218 C.A.3d 887, a property owner argued on the basis of the doctrine of agreed boundaries that the boundary should be set along a fence. The neighbors successfully argued that the neighbors had not agreed that the boundary should be the fence and that the true boundary was not uncertain but could be proved by legal descriptions and surveys.

When a boundary is clear, an oral agreement setting a different boundary will not bind the parties because it is a grant, which is required to be in writing under the statute of frauds.

The following are additional boundary rules:

- If a boundary is a road, the boundary line ordinarily will be the center of the road.
- If a boundary is a nonnavigable river, the boundary will be the center of the river.
- If a boundary is a navigable nontidal river, the boundary will be the average low-water mark.
- If a boundary is tidelands, the boundary will be the average high-tide line.

Division Fences and Party Walls

Division fences are fences on the boundary line. A fence that rests entirely on the land of one owner is not a division fence.

Party walls can be either on the boundary line or entirely on the land of one owner. Generally, they are the support walls of row-type housing. Party walls are established by express or implied agreement.

For division fences and party walls on the boundary line, the individual owners own that portion of the wall or fence on their own property and also have the right of support of the rest of the wall or fence. Either owner can alter his part of the wall or fence but cannot weaken it.

The Good Neighbor Fence Act of 2013 creates a presumption that landowners are equally responsible for the cost of maintaining or replacing a division fence unless there is a written agreement to the contrary. The act requires a neighbor who intends to build or fix a fence to notify the neighbor 30 days in advance, describing the work and estimated costs and how to split the costs. In the absence of any agreement, costs for a division fence will be borne equally by the parties unless one party decides to leave its land unfenced. However, if that party fences the land in the future, the party could be liable for the share of the original cost of the division fence.

It is a misdemeanor to leave a gate open willfully or tear down the fence of another (Penal Code Section 602(h)) that is on the boundary line because part of the fence is owned by another.

Spite fences—fences more than 10 feet high that are erected or maintained for the purpose of annoying an adjoining owner—are a private nuisance and can be abated (nuisances and abatement are explained later in the unit).

CASE STUDY The case of *Wilson v. Handley* (2002) 97 C.A.4th 1301 involved a row of cypress trees that were planted by the Handleys parallel to a property line. The trees were within 2 feet to 10 feet of the property line and were a hybrid variety designed as a screening barrier or windbreak. Their neighbors, the Wilsons, sued the Handleys, relying on Civil Code 841.4 that “any fence or other structure in the nature of a fence” that unnecessarily exceeds 10 feet in height and is maliciously erected or maintained for the purpose of annoying a neighbor is a private nuisance.

While a superior court ruled that a naturally growing row of trees is not within the scope of the spite fence nuisance law, the Court of Appeal reversed, ruling that the trees could be regarded as a spite fence. The case was remanded for trial on the issue of whether the fence was maliciously erected or maintained for the purpose of annoying the Wilsons.

Note: The court pointed out that California has no recognized property right to a view. The court also pointed out that a fence higher than 10 feet may be justified if it serves some additional purpose.

Trees

Trees or shrubs whose trunks are on a boundary line are known as *line trees* and belong to both owners. While both owners can remove branches that overhang their own property (this rule applies to all trees), both owners are also liable for the maintenance of line trees and both must agree to the removal of line trees.

Encroachment

An **encroachment** is an intrusion into, under, or over the land of another. Unless the encroacher has taken title by adverse possession or obtained use by a prescriptive easement, a property owner can go to the courts for relief in the form of an injunction prohibiting the continued encroachment or an ejectment, which is an action for ouster and/or damages.

CASE STUDY The case of *Booska v. Patel* (1994) 24 C.A.4th 1786 involved a defendant who had a contractor sever the roots of a neighbor’s tree at the lot line, causing the tree to die. The trial court held for the defendant. But the Court of Appeal reversed. While the owner has the right to the surface and everything beneath it (Civil Code Section 829), “one must so use his own rights as not to infringe on the rights of others” (Civil Code Section 3514). The court ruled that Patel did not have an absolute right to sever the roots of Booska’s tree if he could have protected his own property interest by taking less severe action. A rule of reasonableness applies, the court explained.

The courts will consider the degree of encroachment, the intent of the parties, the value of the encroaching structure, and the effect on the parties in determining appropriate relief.

An encroaching party might have to remove the encroaching structure, as well as pay damages caused by its removal.

When an encroachment is unintentional and the value of the structure is great compared with the value of the land encroached, the courts and the statutes will allow the encroachment to remain but will have the encroacher pay appropriate damages.

California courts have applied a relative hardship rule in determining whether to grant an injunction to enjoin a trespass encroachment on another's land.

CASE STUDY The case of *Hirshfield v. Schwartz* (2001) 91 C.A.4th 749 involved an unclear boundary line. The defendants built waterfalls, a koi fishpond, stone decking, a putting green, et cetera over an area later determined to encroach on the plaintiff's property in three places. The trial court refused to order the encroachment removed and set monetary damages in lieu of removal. The Court of Appeal determined that the cost of removal of the improvements would be substantial but the benefits of removal to the plaintiff would be minimal. The court, therefore, upheld the superior court's decision.

While the courts in some instances will allow a good-faith improver of the property of another to retain the use as a matter of equity, such relief will not be available if the encroachment was intentional (Code of Civil Procedure Section 871.1 et seq.).

Under the common law, the improvements of the improver, even though made in good faith, belong to the landowner. Under California law, a good-faith improver who under mistake of fact or law made improvements believing he or she had the right to do so can remove the improvements; however, the improver will be liable to the owner for any damages to the property.

If an owner knew of the improvements and allowed the innocent improver to continue adding on the improvements, the improver could be allowed the value of the labor and materials.

An action to remove a permanent **trespass** (encroachment), such as a building, must be taken within three years of the encroachment, or the encroachment will be allowed to remain. The encroacher will have no right to expand the use, nor will the encroacher have the right to rebuild should the encroachment be destroyed.

While a permanent trespass involves taking possession of the land of another with the intent to remain, a continuing trespass is use only. An example of a continuing trespass would be using the land of another for ingress and egress. In the continuing trespass, each repetition is considered a separate wrong. Therefore, the statute of limitations cannot be raised as a defense by a user whose use is continuing. The landowner could sue for an injunction to force the user to cease trespassing, as well as for damages for the wrongful use.

NUISANCE

Ownership does not carry with it the right to use property in any manner the owner wishes. A person cannot use property in such a manner as to interfere with the reasonable use and enjoyment of others. Such unreasonable use would be considered a nuisance.

A **nuisance** is normally a nonphysical invasion that affects the use or enjoyment of others. It could be smell, dust, light, noise, vibrations, radio interference, dangerous activity, indecent acts, or hours of operation.

In California, the difference between a public and a private nuisance is based on degree. Civil Code Section 3480 states, “A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of people, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”

Any nuisance that is not a public nuisance is considered a private nuisance. While there is no statute of limitations on public nuisances, there is a three-year statute of limitations on private nuisances. Laches is not a defense against the party bringing an action to abate a nuisance.

Courts consider reasonableness in determining whether a use is a nuisance. Livestock noises in an area of farms probably would not be considered a nuisance merely because several suburban residents were disturbed by the noise. Similarly, noise during construction is reasonable and nonpermanent and would not be considered a nuisance, although the noise could constitute a nuisance if the work were done at unreasonable hours.

CASE STUDY The case of *Lew v. Superior Court* (1993) 20 C.A.4th 866 involved a nuisance. The Lews were the owners of a 36-unit, HUD-insured, Section-8 apartment complex. Seventy-five small claims actions were filed by neighbors, each requesting \$5,000 damages for allowing illegal drug activity to occur on the premises, causing the neighbors emotional and mental distress.

The small claims court awarded each complainant \$5,000 plus costs. The superior court set total damages at \$218,325, finding that the Lews knew or should have known of the problems generated by their building and failed to remedy the situation. The award was based on the theory of both public and private nuisance.

The Court of Appeal affirmed, holding that by California statute, a drug house is a nuisance and small claims court damages by private parties is a proper remedy. The fact that a nuisance is public does not deprive an individual of his action because, as to him, it is private and obstructs free use and enjoyment of private property.

Note: The *Lew* case provides a strong private remedy for neighbors to fight a neighborhood problem.

The fact that zoning permits a use does not mean the use is not a nuisance; it will be considered a nuisance if it unreasonably interferes with the rights of others. It also is not a defense in California that the nuisance was present before the plaintiff moved in.

Action involving a nuisance could be money damages, injunction, or **abatement** (removal) of the nuisance.

A public nuisance that affects the entire community or neighborhood must be abated by a public body or an officer authorized by law. An individual may not abate a public nuisance unless it materially deprives use of private property.

Civil Code Section 3502 provides that “a person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance without committing a breach of the peace or doing unnecessary injury.” This “self help” remedy can be extremely risky, however, because a party whose actions are not justified or reasonable could be liable for damages.

An owner cannot abate the nuisance if it is weeds that are on neighboring land.

Courts will consider the economic effects of the nuisance abatement or injunction compared with the damages caused by the nuisance. Courts also will consider the motives of the parties, such as a personal feud. If an interference is not substantial, courts are unlikely to enjoin a use.

WATER RIGHTS

Water is an extremely valuable resource in California, and water rights frequently are subject to litigation. The courts are authorized to refer all water litigation to the state Water Resources Control Board for either investigation and report, or hearing and preliminary determination, subject to final court decision.

Surface water rights depend on whether water is flowing in a defined channel. A property owner generally cannot obstruct the flow of surface water not in a defined channel. An owner can, however, dike against overflow water from a defined channel, which is floodwater, even when such actions cause flooding to land of another.

To dam or divert water in a defined channel requires approval of the local flood control district.

Runoff Damage

Under common law, an owner who changed natural surface water runoff was liable for resulting damages. However, because the development of buildings and paved areas has dramatically increased the amount of runoff, California has modified this liability. While an upper-land owner may be liable if failing to exercise reasonable care, the lower-land owner also must take reasonable precautions to avoid or reduce potential damage.

The rule of reasonableness applies to the use of the upper-land owner. The fact that runoff from use causes some damage to a lower-land owner’s land does not in itself make the upper-land owner liable.

See *Keys v. Romley* (1966) 64 C.2d 396.

Water-Related Terms

Following are important water-related legal concepts:

- **Riparian rights** are rights of owners to the reasonable use of water flowing adjacent to, under, or through the property (rivers or streams). Riparian rights are held in common with other riparian owners, even though an owner might never use them.
- **Littoral rights** are rights of owners of property bordering lakes, seas, or oceans (non-flowing water) to a reasonable use of the water.
- The **right of correlative use** holds that an owner does not have absolute use of the ground water not in a defined water course under the owner's property. When water is scarce, an owner must share the water table with other owners. The use of underground percolating water in relation to the other owners must be reasonable according to the right of correlative use.
- The **right of prior appropriation** is a concept in several western states that whoever takes water first gets a priority right to future use. While California courts have followed this concept, it has not been followed by the federal courts. One who does not own riparian rights can get rights of prior appropriation through either an easement by grant or an easement by prescription (discussed later in the unit). An easement by prescription would require the open, notorious, and hostile taking of water under some claim of right for five years without interruption.
- **Accretion** is the gradual and imperceptible buildup of soil by natural causes, such as by action of wind or water. The addition to the land, known as alluvion, belongs to the property to which it is joined. Title is acquired by accession.
- **Avulsion** is the sudden loss of land by action of water, such as a change in a river's course. A property owner has one year to reclaim the property. (The river could be diverted back to its original course.)
- **Reliction** is a right, holding that when a lake, a sea, or a river permanently recedes, the adjoining waterfront property owners can take title to the adjacent land created by the withdrawal of the water.

SUPPORT

Lateral Support

Owners have a right to have their land supported in its natural state by the land of neighbors. This support by adjoining property is known as **lateral support**. However, owners cannot prohibit excavation on a neighbor's property.

People who are negligent in excavating their property will be liable in tort for the resulting damages. In the absence of negligence, owners do not have absolute liability for damages caused to the property of others by excavations.

Civil Code Section 832 requires that owners give reasonable notice to neighboring owners of the date of excavation and the depth intended. Excavators who fail to notify adjoining owners of the excavations will have absolute liability for any resulting damages. If the

depth is below the neighbors' foundations, the owners must allow the neighbors 30 days to protect their property. Owners have the right to enter the land to be excavated to extend their foundations.

If an excavation is to be deeper than 9 feet from the curb, the excavator will be liable for damages to neighboring structures. The excavator can enter the neighboring property to protect the structures.

The excavator will not be liable for minor settlement cracks. Heavy rains will not excuse an excavator, because rains can be anticipated.

Because damage might appear later, there is a three-year statute of limitations for damages caused by excavations.

Subjacent Support

Subjacent support is support from below. An underground excavator has an absolute duty to support the surface regardless of any negligence. Cases generally involve owners of mining rights and tunnels for utilities or subways.

EASEMENTS

An **easement** is a legal interest in the land of another that entitles the owner of the easement to a limited use or enjoyment in the land of another. It is a nonpossessory interest of one who does not control possession as an owner or a tenant. Most residential properties are subject to easements, with utility easements being the most common.

An easement right is for a specific purpose, such as ingress or egress. The easement right could be for continuous use or for intermittent use at specific times. The owner of the property may not interfere with the reasonable exercise of the easement right by the easement holder. Unless the easement specifies exclusive use, it can also be used by others.

CASE STUDY In the case of *VanKlombenberg v. Berghold* (2005) 126 C.A. 4th 345, plaintiff had an easement over defendant's property. The indenture provided that the right-of-way was "to be kept open as a private roadway and be wholly unobstructed."

The defendants had several burglaries and had observed trespassers and illegal dumping. They subsequently installed two locked gates across their easement. While keys to the gates were provided to the plaintiffs, the plaintiffs sought a court order to dismantle the gates. The trial court enjoined the defendants from maintaining gates and the defendants appealed.

The Court of Appeal affirmed the ruling that the easement expressly required the roadway to be "kept open" and "wholly unobstructed." The language of the easement determines the scope of the easement.

Note: This case shows that modification of the easement requires concurrence of the easement holder.

Servient Tenement

The land being used by another is in servitude, or serves the needs of another. The land being used, therefore, is known as the **servient tenement**. Because the use by another necessarily places restrictions on an owner's use, a servient tenement is an encumbrance on the land. If the location of an easement is not specified, the servient tenement holder can reasonably designate the easement area.

Dominant Tenement

Normally, an easement benefits other land. For example, ownership of a parcel of land could carry with it the right to cross another parcel. The land being benefited by the easement dominates the servient tenement and is known as the **dominant tenement**. Because a dominant tenement carries benefits with it in the use of the land of another, the easement is considered an appurtenance to the land. Easement rights run with the land, so transfer of title also transfers the rights and/or obligations. The rights of the dominant tenement cannot be separated or conveyed without the land.

The dominant tenement need not be adjacent to the servient tenement.

Maintenance of Easement

In the absence of any agreement on the maintenance of a right-of-way, the responsibility rests on the dominant tenement. The dominant tenement holder has the right to enter the servient tenement for the purpose of repair and maintenance.

If an easement is jointly used with the landowner and other easement users, the costs of maintaining and repairing the easement will be based on the percentage of use of each user.

Easement in Gross

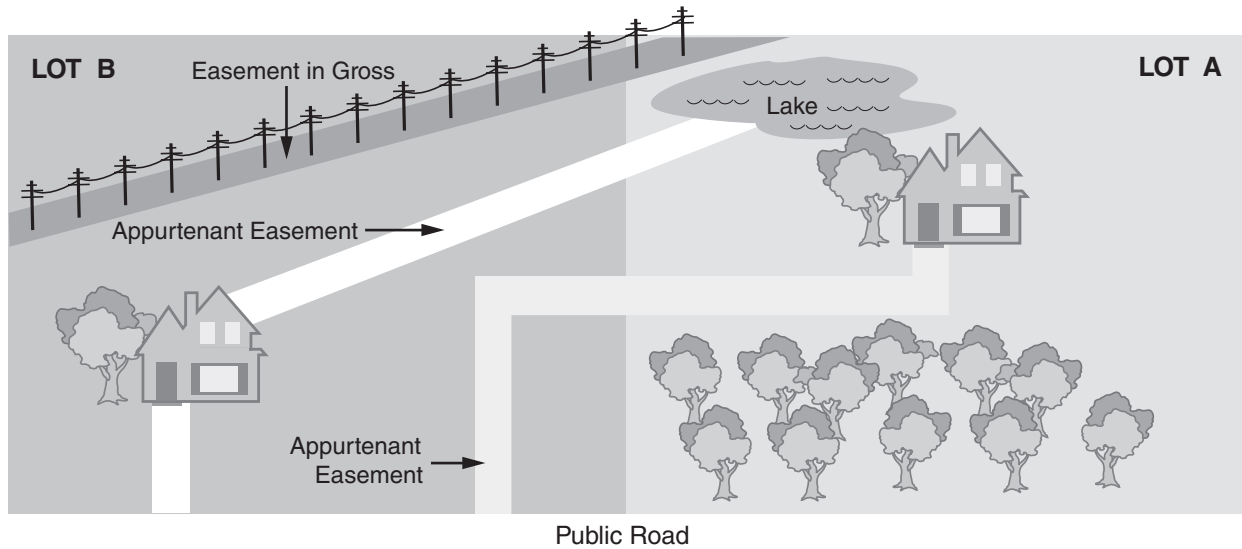
An **easement in gross** is an easement right that is not joined to any dominant tenement. It is considered personal in nature. Examples of easements in gross are a right to erect a sign on the land of another and a utility company's right to run lines over a property.

Because an easement in gross is personal in that it does not go with the land, it is considered an assignable right unless the right is expressly or impliedly made personal to an individual. An easement in gross must be expressly transferred to be assigned.

CASE STUDY Pacific Telephone had an easement “for the stringing of telephone and electric light and power wires” over the property of Salvaty. A cable television company obtained a license from Pacific Telephone to use its poles. In *Salvaty v. Falcon Television* (1985) 165 C.A.3d 798, Salvaty brought an action for trespass, inverse condemnation, and unfair business practice against the cable company and Pacific Telephone. The court held that inclusion of cable television fell within the scope of the original easement. It was part of the natural evolution of communication and did not increase the burden on the servient tenement.

Figure 12.1 is included to help visualize the terminology related to easements.

FIGURE 12.1: Easements



The owner of Lot B has an appurtenant easement across Lot A to gain access to the lake. Lot B is dominant and Lot A is servient. The utility company has an easement in gross across both parcels of land for its power lines. Note that Lot A also has an appurtenant easement across Lot B for its driveway. Lot A is dominant and Lot B is servient.

Affirmative and Negative Easements

An **affirmative easement** gives the owner of the dominant tenement the right to do something, normally the right to enter and cross the land of the servient tenement.

A **negative easement** gives the owner of the dominant tenement the right to prohibit the owner of the servient tenement from some action. For example, the owner of the dominant tenement could impose a height limitation so that the servient tenement owner does not block a view.

Private and Public Easements

Most easements are given to specific property or people and so are said to be private easements. An easement given to the general public to cross the property is a public easement.

Creation of Easements

Easement by grant An easement can be created by an actual grant, such as when a person purchases an easement right. Sometimes, easements are needed to obtain map act approval of a subdivision; these easements by dedication also are really easements by grant. Owners might agree to grant easements to each other for a common good, such as a private road serving their properties. Besides grants for ingress or egress, easements can be granted for use, such as seasonal storage. Solar easements protect sunlight for solar collectors. A

view easement would prohibit the servient tenement from building or allowing trees to interfere with the view.

Easement by reservation An easement can be created by a reservation, whereby the grantor retains an easement right over the property granted.

Easement by prescription An **easement by prescription** is an easement obtained by use. For the user to obtain the easement, the use must be open, notorious, hostile, under some claim of right, and continuous for five years. Courts hold that a claim of right does not require a belief or claim that the use is legally justified. It merely means that the property was used without the permission of the owner. (*Felgenhauer v. Soni* (2004) 121 C.A.4th 17) An easement by prescription cannot be obtained against a minor or a state, federal, or local governmental unit.

The five-year use need not, however, be by the same user but could be by successors in interest. Tacking on—where, for example, one user uses property for two years and a successor uses it, based on a privity relationship, for three years—will constitute the five years necessary for a prescriptive easement.

Any interference in the use by the legal owner of the property will cause a new five-year period to begin, because the five-year use must be continuous.

The principal difference in establishing an easement by prescription and title to an entire parcel by adverse possession is an easement requires no property tax payment, whereas adverse possession title requires tax payment for five years.

An easement established by prescription is the only easement that is lost by nonuse. Five years of nonuse will end the easement right.

An easement by prescription obtained against a tenant-occupied property applies only to the tenant's interest.

CASE STUDY In the case of *Dieterich International Truck Sales v. J.S. & J. Services, Inc.* (1992) 3 C.A.4th 1601, a truck sales and repair business had used part of an adjoining property for trucks entering service bays for 22 years. The adjoining truck stop property lessee fenced off the property to install underground tanks for its service station. The truck sales business claimed a prescriptive easement. The court held that while the truck sales and service business had a prescriptive easement against the tenant, who was on a 49-year lease, there was no prescriptive easement against the owner, who would not get possession until 2005.

An easement by prescription applies to the use established during the prescriptive period and may not be expanded for greater use. If the nature of the use changes, a new five-year prescriptive use period will be required to obtain easement rights. In other easements (by grant or reservation) the courts take a liberal view of use. See *Connolly v. McDermott* (1984) 162 C.A.3d 973.

Civil Code 1009 bars a recreational user from acquiring a prescriptive easement over private land.

The fact that others also are using the property does not defeat an easement by prescription, because multiple easements are possible. However, permission defeats an easement by prescription because the use is not hostile.

A prescriptive easement could be an exclusive easement if the use of others would not be compatible with the prescriptive easement.

CASE STUDY The case of *Otay Water District v. Beckwith* (1991) 1 C.A.4th 1041 involved a water district that sought quiet title to a prescriptive easement. The water district had purchased property for a reservoir. A grant deed that it received included property that the grantor did not own. The water district then built a reservoir.

The court held that the district's use was hostile and under a claim of right. Its use created a prescriptive easement. The easement was held to be exclusive use because the owner's planned recreational use would have interfered with the use of the reservoir.

Note: While the water district could not obtain title by adverse possession because it did not pay the taxes, an easement of exclusive use gives it all the benefits of ownership.

An implied dedication of an easement to the public is possible if the public, with the owner's knowledge and without consent, uses the right-of-way for five years.

An owner can protect against unauthorized user interests by recording: "The right of the public or any person to make any use whatsoever of the above-described land or any portion thereof (other than use expressly allowed by a written or recorded map, agreement, deed, or dedication) is by permission and subject to control of owner" (Civil Code Section 813). This recording would be conclusive proof that the use was permissive in any lawsuit claiming dedication to public use. For use by other than the general public, the notice must be served by registered mail on the user to be effective.

Owners also can protect themselves from prescriptive easements by individuals by posting, at intervals of 200 feet or less, "Right to pass by permission and subject to control of owner, Section 1008, Civil Code."

A servient tenement owner can get title by adverse use against a dominant tenement's easement. Assume a servient owner builds across an easement so that use will be impossible; after five years, this adverse use by the servient tenement holder could defeat the prior easement.

CASE STUDY In the case of *Masin v. LaMarche* (1982) 136 C.A.3d 687, a servient tenement owner used a road for the storage of material and equipment so that access was denied to the dominant tenement. After seven years' nonuse the dominant tenement holder wished to have the road cleared so it could be used. The court held that the easement had been lost because of the adverse possession by the servient tenement.

Easement by Implication

Besides being expressly created, an easement can be created by implication. An **implied easement** is one that was probably intended but not expressed. The following are necessary to create an easement by an implied grant:

- There must be a separation of title (before separation, the dominant and servient tenements were under the same or common ownership).
- Before separation of title, there must have been a use that was obvious and of such duration to indicate it was intended to be permanent.
- The use must have been reasonably necessary for the beneficial enjoyment of the land conveyed.

CASE STUDY *Dubin v. Robert Newhall Chesebrough Trust* (2001) 96 C.A.4th 465 involved a landowner who blocked an access driveway to the plaintiff's property that was over other land owned by the defendant. The access over the driveway was not mentioned in the lease. After the death of lessor, the successor owner asked Dubin not to use the driveway. When Dubin did not comply, the owner erected crash posts to block the driveway, which had been used by heavy trucks and trailers. Dubin sued the landlord, alleging an implied easement appurtenant, an easement by necessity, and a prescriptive easement. While the superior court granted the landlord's demurrer, the Court of Appeal reversed.

Although other access precluded an easement by necessity and a prescriptive easement was not present because the use was for less than five years, the court ruled that Dubin did state a claim for implied easement appurtenant. The court indicated the easement use was reasonably necessary for use of the premises.

Note: The court seemed to be saying that if the landlord and the tenant had thought about it, they would have included the easement in the lease. Because they did not, an implied easement appurtenant was created.

If an owner sells a lot that in the past has been reached through land retained by the grantor, the courts could say that an easement right was implied. The courts would consider whether the use was reasonably necessary for proper use, whether it was apparent at the time of sale, and whether the parties intended an easement to exist.

For an implied easement by reservation, the use must have been necessary for the reasonable enjoyment of the property retained by the grantor. An example would be the owner selling a house on a street while retaining a house on the back portion of the lot but failing to reserve an easement right over a driveway on the portion of the land conveyed.

Oil and mineral rights carry with them an implied easement to enter and drill or mine unless the right is clearly excluded (in which case entry would have to be made outside the property).

A former tenant has an implied easement to enter and harvest the crops that were the fruit of the tenant's labor (emblemments).

California generally does not recognize the common-law-implied easement of light and air. An exception is the Solar Shade Act (California Public Resources Code Sections 25980–25986), which provides an implied easement of light in special cases. After a party has installed a solar collector in compliance with the act, a neighbor cannot permit trees to shade more than 10% of the solar collector between the hours of 10:00 am and 2:00 pm.

To defeat the possibility of an easement by implication, the parties can specify that no easement by grant or reservation will arise by implication.

Easement by Necessity

California courts will in some instances create an **easement by necessity** when an easement is required to allow reasonable use of a property. The dominant and servient tenements must have been under common ownership at time of conveyance. A grantor must have conveyed a portion of a property, retaining a portion, and have created a landlocked parcel. There also can be no other way to get to the property, no matter how inconvenient or difficult. It is a strict necessity concept. Once granted, an easement by necessity runs with the land but will be lost if another access becomes available.

No payment is required when an easement by necessity is created, under the theory that the prior common owner just forgot about creating an easement.

Easement by Eminent Domain

Easements can be obtained by condemnation for any public purpose. This right has been given to utilities for rights-of-way. The landowner is entitled to be compensated for any loss in value caused by the taking of the easement.

It is possible for a property owner to use condemnation to obtain an easement for utility services over the land of another. It does not have to be the only way to obtain utilities, just the most practical.

Easement by Estoppel

An **easement by estoppel** can be created when an owner, by words or acts, causes another party to act to the other party's detriment. For example, if an owner told a prospective purchaser of a neighboring parcel that there was an easement to it over his road, the owner could be estopped (prevented) from denying the existence of the easement after the other party purchased the land.

Termination of Easements

Easements are lost upon the following events:

- **Destruction of the servient tenement:** If there is no longer a servient tenement, there can be no easement.
- **Merger:** If the dominant and servient tenements become owned by the same person, the easement can be lost. A person would not have an easement over her own property. When a lesser interest and a greater interest are joined, the lesser interest is lost by merger.
- **Nonuse:** Nonuse terminates only an easement by prescription (five years' nonuse).
- **Deed:** A quitclaim deed from the holder of the dominant tenement to the holder of the servient tenement ends the easement. This would be an express release of the easement.
- **Prior lien foreclosure:** If a prior lien against the property exists at the time an easement is granted, the subsequent foreclosure of that lien will wipe out the easement. The dominant tenement holder could have obtained an agreement with the lienholder to subordinate his interest to the easement.
- **Estoppel:** If a dominant tenement holder indicates to the servient tenement holder that the easement will not be used or has been abandoned and the servient lienholder relies on this statement to her detriment, the dominant tenement holder will be estopped from claiming an easement right.
- **End of purpose:** An easement ends when the stated purpose of the easement ends. An easement to enter in order to hunt game will end with the urbanization of the area.
- **End of necessity:** An easement granted because of necessity ends when the necessity no longer exists.
- **Eminent domain:** The taking of the property for a public purpose ends the easement. The dominant tenement holder will, however, have a claim for his interest based on just compensation for the fair market value.
- **Misuse:** An easement can end by misuse, although an injunction and/or monetary damages, not forfeiture, would be the normal remedy granted by the courts.

LICENSE

Unlike an easement, a **license** is not an interest in land; it is a permissive use. What would otherwise be a wrongful trespass would be permissible with a license. Unauthorized use or trespass does not create a license. A license always requires permission and is revocable.

While a license can be an exclusive privilege, in the absence of any agreement, it will be nonexclusive.

A license is personal to the licensee. It does not transfer with real property, cannot be assigned by the licensee, and cannot be inherited. Transfer of ownership of the property over which the licensee has permission will revoke the license.

A licensee is not a tenant. A tenant has possession and can assign his or her interests. A licensee does not have possession, but merely a revocable privilege to use.

Because a license is not an interest in real property, the statute of frauds does not prohibit the creation of oral licenses.

An owner has a duty to keep the property in a safe condition for the licensee. The licensee should be warned of any danger.

While a license generally can be revoked, courts have held that where the licensee has expended capital and labor in reliance on the license, it would not be equitable to allow the owner to revoke the license. The principle of estoppel will apply.

CASE STUDY In the case of *Cooke v. Ramponi* (1952) 38 C.2d 282, a license was granted to use a road. The licensee expended a great deal of money and energy improving the road and building culverts. The court held that the license was irrevocable. Using the doctrine of equitable estoppel, the court determined that to decide otherwise would allow the licensor to perpetrate fraud against the licensee.

SUMMARY

Parties can agree on fixed boundaries when exact boundaries are in dispute. Such agreements bind successors in interest to the parties (doctrine of agreed boundaries).

In the event of an ambiguity in a boundary, reference to a natural monument will take precedence over angles or distances.

An encroachment is an intrusion into, under, or over the land of another. An action to remove a permanent encroachment must be taken within three years of the encroachment, or it will be allowed to remain. A good-faith improver of the property of another will be allowed to remove the improvements but will be liable for damages to the property of another. If the improvement is costly, however, the court might allow the unintentional encroachment to remain intact.

A nuisance is a use that interferes with the use or enjoyment of the land of another. An abatement action would be taken to remove a nuisance, and an injunction would require a use to cease.

Upper-land owners may be liable if they fail to exercise reasonable care and runoff consequently causes damage to a lower property. The courts will consider the utility of the upper-land owner's use compared with the harm caused.

Riparian rights are the rights of an owner to reasonable use of water flowing through, under, or adjacent to a property. Littoral rights are the rights to reasonable use of nonflowing water (lakes or seas).

The right of correlative use is the reasonable right to use, in conjunction with others, the underground percolating water.

California follows the doctrine of prior appropriation. The first user of water has priority over later users.

Owners have duties toward others, which include lateral and subjacent support of other lands.

An easement is an interest in the land of another (normally for ingress and egress). The property using the land of another is the dominant tenement, and the property being used is considered the servient tenement. If there is no dominant tenement—that is, no other property is being benefited—it is an easement in gross. An easement in gross specifically must be transferred by the easement holder, while a normal easement runs with the land.

Easements allowing use of the land of another are affirmative easements, and easements that prohibit the owner of the servient tenement from a use are negative easements.

Easements may be created by grant or reservation in a deed, prescription (adverse use), implication, necessity, eminent domain, or estoppel.

Easements may be lost by destruction of the servient tenement, merger, nonuse (easements by prescription); deed, foreclosure of a prior lien, estoppel, end of purpose; and end of necessity, eminent domain, or forfeiture for misuse.

A license is a revocable permission that is personal in nature and does not run with the land.

DISCUSSION CASES

1. A general right-of-way was granted, but its location was not specified. **Who would decide where the easement would be located?**

Collier v. Oelke (1962) 202 C.A.2d 843

2. A tenant leased 2,400 acres. The landlord plaintiff claimed that the defendant failed to remove millions of pounds of waste rocket fuel material and other hazardous substances from the property. The complaint alleged causes of action for nuisance and trespass. **Were these proper causes for relief?**

Mangini v. Aerojet General Corp. (1991) 230 C.A.3d 1125

3. Vinod Khosla, a billionaire, had defied state regulations by refusing access to Martins Beach. After purchasing property adjoining the beach, Khosla locked gates leading to the beach. California law regulates coastline access and prioritizes public beach access. The California Court of Appeal ordered Khosla to restore public access. Khosla has appealed to the U.S. Supreme Court claiming the state has crossed a constitutional line. **Do you think this is a taking without compensation?**

Surfrider Foundation v. Martins Beach LLC (2017) 14 C.A.5th 238

4. An easement to use a common stairway for two buildings stated that the stairway “shall be perpetually kept open.” The building with the stairway was destroyed. **Must the owner rebuild?**

Muzio v. Erickson (1919) 41 C.A. 413

5. An owner cut down trees on the boundary line to use them for firewood. **Was this action proper?**

Scarborough v. Woodill (1907) 7 C.A. 39

6. Weeds were growing on the banks of a drainage ditch. Seeds from the weeds invaded the neighboring property. An action was brought to abate a nuisance. **Must the owner remove the weeds?**

Boarts v. Imperial Irrigation District (1947) 80 C.A.2d 574

7. A home slid into a neighbor’s home. This loss was caused by natural conditions. **Should the upper-land owner be liable for the loss?**

Sprecher v. Adamson Cos. (1981) 30 C.3d 358

8. A shopping center’s drainage runoff went through a concrete drainage ditch and eventually led to a 15-foot-wide natural stream. The natural stream crossed the plaintiff’s land, and some of the water flowed across the land, leaving mud and debris. **Assuming that the volume of water from the shopping center caused the stream to overflow, is the shopping center liable for resulting damages?**

Deckert v. County of Riverside (1981) 115 C.A.3d 885

9. Bel Air Country Club used a strip of land adjacent to the sixth fairway as a rough for 40 years. The plaintiff had actual knowledge that balls were hit and retrieved from the area daily but had never erected permissive use signs or taken steps to halt the use. **What are the rights of the Bel Air Country Club?**

MacDonald Properties Inc. v. Bel Air Country Club (1977) 72 C.A.3d 693

10. Drivers to the plaintiff's warehouse trespassed on adjacent property to turn around and back into loading docks. Depending on individual drivers' habits and skills, drivers utilized different portions of the adjacent property. **After use for the statutory period, does the plaintiff have a prescriptive easement?**

Warsaw v. Chicago Metallic Ceilings Inc. (1984) 35 C.3d 564

11. An easement holder lined a ditch with Gunitite to stop the water seepage. The result was that vegetation that had flourished in the soil from water percolating through the walls of the ditch died from lack of water. **Was the easement holder's action proper?**

Krieger v. Pacific Gas & Electric Co. (1981) 119 C.A.3d 137

12. A property owner brought an action against a neighbor to prevent the neighbor from cutting out his light. **Does a property owner have a right to light?**

Ingwersen v. Barry (1897) 118 C. 342

13. Underground telephone lines were installed outside the easement area. These lines were intended to remain in place for 100 years. After 25 years, the landowner wants their removal because they are a continuing nuisance/trespass. **Must the lines be moved?**

Spar v. Pacific Bell (1991) 235 C.A.3d 1480

14. The San Diego Gas and Electric Company added power lines on an easement adjacent to the plaintiff's home, resulting in increased levels of electromagnetic radiation. **Should the San Diego Gas and Electric Company have any liability to the homeowner?**

San Diego Gas and Electric Co. v. Superior Court (1996) 13 C.4th 893

15. An oral agreement was made between two property owners where one owner would build a wall on the top of a slope rather than on the property line at the bottom. The party building the wall would do so at his own expense, but it would be on the neighbor's property. The reason for the agreement was that a wall on the bottom of the slope would not afford either property owner any privacy. **Can a later owner of the upper property require the removal of the wall?**

Noronha v. Stewart (1988) 199 C.A.3d 485

16. Because of a mistaken belief as to boundary locations, a nursery owner planted cactuses on a neighbor's property. A survey revealed the correct boundary, and the neighbor sued for quiet title. The cactuses were worth an estimated \$180,000. **Is the neighbor entitled to keep the cactuses?**

Tremper v. Quinones (2004) 115 C.A.4th 944

17. A property owner piped water from a spring a mile away. **By meeting the requirements of prescriptive use, does the owner obtain rights to take the water?**

Brewer v. Murphy (2008) 161 C.A. 4th 928

18. A trial court ruled that building a home that encroaches on a neighbor's property could be an accident covered by homeowners insurance. **Do you agree?**

Fire Insurance Exchange v. Superior Court (2010) 181 C.A. 4th 388

19. The city of Beverly Hills planted a stand of coastal redwoods in a public park. The trees grew to block the view of some residents of Beverly Hills, the Hollywood Hills, and downtown Los Angeles. The homeowners sued for inverse condemnation. **Are the homeowners entitled to a legal remedy?**

Boxer v. City of Beverly Hills (2016) 246 C.A. 4th 1212

20. Water levels in a coastal lagoon were kept low by the county flood control. The Department of Fish and Wildlife (DFW) took control of the flood control process and allowed more water into the lagoon to protect environmental resources. This resulted in flooding situations in a subdivision. The homeowners sued for inverse condemnation. The DFW claimed they had no duty to provide flood protection. **Do you agree?**

Pacific Shores Property Owners Association v. Dept. of Fish and Game (2016) 244 C.A. 4th 12

UNIT QUIZ

1. Which correctly matches the boundary with its boundary line?
 - a. Road/center of the road
 - b. Nonnavigable river/center of the river
 - c. Navigable river/average low-water mark
 - d. All of these are correctly matched
2. When a tree trunk is on the boundary line,
 - a. both owners must agree to its removal.
 - b. it belongs to both owners.
 - c. both owners can trim branches over their own property.
 - d. all of these are correct.
3. An action for the removal of a permanent encroachment must be commenced within
 - a. three years of the encroachment.
 - b. four years of the encroachment.
 - c. 10 years of the encroachment.
 - d. a reasonable period.
4. A nonphysical invasion of the property of another would likely be
 - a. an encroachment.
 - b. a trespass.
 - c. a nuisance.
 - d. an easement.
5. What is *TRUE* regarding nuisances?
 - a. There is a three-year statute of limitations on a private nuisance.
 - b. A public nuisance cannot be abated by the action of a private citizen.
 - c. Nuisances that are not private nuisances are considered public nuisances.
 - d. All of these are true.
6. A dispute between riparian rights holders would likely be heard by the
 - a. federal district court.
 - b. local water agency.
 - c. Water Resources Control Board.
 - d. none of these.

7. After an owner developed his property, water runoff from it damaged a lower property. Which statement about liability for this damage is *TRUE*?
 - a. The upper-land owner is strictly liable.
 - b. The upper-land owner is liable for only the percentage of damage based on the percentage of increase in runoff.
 - c. If the development was reasonable use of the land with reasonable care, the upper-land owner is not liable.
 - d. None of these is true.
8. Riparian rights can *BEST* be described as
 - a. the absolute right to adjacent water.
 - b. reasonable use of flowing water.
 - c. reasonable use of nonadjacent water.
 - d. reasonable use of nonflowing water.
9. Littoral rights refer to
 - a. the underground water table.
 - b. water within a defined flowing channel.
 - c. nonflowing water.
 - d. the right of ingress and egress.
10. To get to his home, A has an easement of ingress and egress over the land of B. As to the easement,
 - a. A has a servient tenement.
 - b. the easement is in gross.
 - c. the easement is an appurtenance to B.
 - d. A has a dominant tenement.
11. “Acquired by accession” *MOST* likely refers to
 - a. a prescriptive easement.
 - b. accretion.
 - c. an encroachment.
 - d. an easement in gross.
12. A boundary stream suddenly changed course, resulting in removal of land from one owner to another. This is an example of
 - a. accretion.
 - b. avulsion.
 - c. erosion.
 - d. reliction.

13. An owner who excavates on her property below the level of a neighbor's foundation is
 - a. always responsible for damages to her neighbor's structure.
 - b. required to give notice to the neighbor of the proposed excavation.
 - c. both of these.
 - d. neither of these.
14. "It goes with the land" *BEST* describes
 - a. a homestead right.
 - b. a license right.
 - c. an appurtenant easement.
 - d. an easement in gross.
15. A sign company that has a right to place a billboard on the land of another would *MOST* likely hold
 - a. a license.
 - b. an easement in gross.
 - c. an appurtenant easement.
 - d. a fee simple.
16. John had all the elements of an easement by prescription for four years. The owner then gave permission to others for similar use of the property. What are John's rights?
 - a. A new five-year period would start.
 - b. Multiple use defeats the user's rights to an easement by prescription.
 - c. The permission granted to others defeats John's chances of obtaining an easement right.
 - d. With one more year of open, notorious, and hostile use, John can obtain an easement.
17. Owners may *NOT* protect themselves against users obtaining prescriptive easements by
 - a. recording a permissible use statement.
 - b. posting "right to pass by permission and subject to control of owner."
 - c. ordering wrongful users to cease their trespass.
 - d. doing any of these.
18. A grant of mineral rights made no mention of an easement to enter the property. What are the rights of the mineral rights holder?
 - a. The holder must make a subterranean entrance from outside the property.
 - b. The holder has no right of entrance.
 - c. The holder has an implied easement to enter and mine.
 - d. The holder can obtain an easement by necessity but must pay the fee owner for all resulting damages and loss of use.

19. A landlocked property owner would likely ask the court for
 - a. an easement by prescription.
 - b. an easement in gross.
 - c. an easement by necessity.
 - d. adverse possession.
20. An easement by necessity requires
 - a. payment for the easement right.
 - b. former common ownership of the dominant and servient tenements.
 - c. both of these.
 - d. neither of these.
21. In the course of a sale, the seller told the buyer there was an easement to the property over other land the seller owned. The seller may *NOT* deny the easement, because of
 - a. prescriptive use.
 - b. estoppel.
 - c. the statute of frauds.
 - d. necessity.
22. An easement by grant will be lost through
 - a. nonuse.
 - b. foreclosure of a prior lien.
 - c. merger of the dominant and servient estates.
 - d. both b and c.
23. Which would *NOT* terminate an easement created by grant?
 - a. The destruction of the servient tenement
 - b. A merger
 - c. Nonuse
 - d. A quitclaim deed to the encumbered property from the dominant tenement to the servient tenement
24. For six years, Alfred, with Smith's permission, used a shortcut over Smith's land to get to his home. Alfred likely now has
 - a. an easement by necessity.
 - b. an easement in gross.
 - c. an easement by prescription.
 - d. a license.

25. What is not *TRUE* regarding a license?
- a. It goes with the land.
 - b. It is an interest in real estate.
 - c. It can be inherited.
 - d. None of these are true.

13

UNIT THIRTEEN



LAND-USE CONTROLS

KEY TERMS

aesthetic zoning	cumulative zoning	negative declaration
Alquist-Priolo Special Studies Zone Act	declaration of restrictions	nonconforming uses
bulk zoning	development impact fees	noncumulative zoning
California Environmental Quality Act	downzoning	partial zoning
Coastal Zone Conservation Act	Endangered Species Act	preliminary public report
comprehensive zoning	environmental impact report	public report
conditional public report	exclusionary zoning	rezoning
conditional-use permit	general plan	special-use permit
conditions	historical designations	spot zoning
covenants	incentive zoning	Subdivided Lands Law
covenants, conditions, and restrictions	inclusionary zoning	Subdivision Map Act
	Interstate Land Sales Full Disclosure Act	upzoning
	National Environmental Policy Act	variance
		zoning

ZONING

Zoning is public control of land use and is permitted under the constitutional doctrine of police power. Police power allows governmental units to enact legislation for the health, safety, morals, and general welfare of the community. Besides covering use, zoning sets standards for height, open space, setbacks, parking, lot size, building size, and similar issues. Zoning can even cover aesthetics and serve to limit growth.

California has no uniform requirement for zoning symbols. For example, uses allowable under the designation M-3 might vary greatly from area to area. Therefore, one who wants to determine how land in a particular area is zoned must first determine the meaning of the zoning symbols in that city or county.

Every city and county in California is required to develop a **general plan**. This plan, when approved by the local legislative body, becomes the comprehensive zoning for the area. Enabling legislation gave cities and counties the right to control land use through zoning. Adoption of zoning and changes in zoning require public hearings. Cities are required to bring their zoning into conformance with their general plan.

Zoning can be appealed to the courts, but the plaintiffs first must exhaust all administrative appeals. Zoning must be a reasonable exercise of the police power of the state. The courts therefore will not uphold arbitrary zoning or restrictions that tend to create a monopoly.

CASE STUDY The Pennsylvania case of *National Land and Investment Co. v. Kohn* (1965) 215 A.2d 597 involved a zoning ordinance that required four-acre lots. The developer wanted to reduce the lot size to one acre. The court conceded that there is a presumption of validity to a zoning ordinance and that the burden of proving it invalid falls on the one challenging it. It further indicated that the fact that a developer will suffer an economic loss is not a reason to declare zoning unconstitutional. Nevertheless, the court held that the zoning in this case was invalid because zoning must bear a substantial relationship to police power purposes and must not be unreasonable, arbitrary, or confiscatory. Keeping the area exclusive was not a proper exercise of police power. The court indicated that evidence of protection from pollution could have supported the reasonableness of four-acre sites, but such evidence was not introduced.

CASE STUDY Zoning can have the effect of keeping the poor and minorities out of an area. The federal case of *Hope v. County of DuPage* (1983) 717 F.2d 1061 concerned zoning regulations of DuPage County, Illinois. This wealthy county regulated lot size, setbacks, and parking, which effectively precluded housing for the poor and minorities. The court determined that the regulations were discriminatory and enjoined the enforcement of the ordinances. The county was ordered to develop a plan that would provide more housing for the poor.

CASE STUDY In *Southern Burlington County NAACP v. Township of Mount Laurel* (1975) 336 A.2d 713, the New Jersey Supreme Court required a township to redo zoning to provide a fair share of housing for the poor. A similar California case was *Associated Homebuilders Inc. v. City of Livermore* (1976) 18 C.3d 582, in which the court held that zoning must respond to regional welfare.

California courts will not award owners damages when a change in zoning reduces property value. California courts treat zoning as a police power regulation, not eminent domain, which is a taking of property. Several federal courts have taken a contrary position and have awarded damages when zoning change adversely affected value.

CASE STUDY The case of *Lake Nacimiento Ranch v. San Luis Obispo County* (1987) 830 F.2d 977 involved 1,500 acres of land bordering a lake that had been zoned for recreational use. In 1980, the county rezoned the property as “rural lands,” which limited the use. The ranch claimed the rezoning was a taking.

The court pointed out that rezoning is invalid if it does not advance legitimate state interests or if it denies an owner economically viable use of the land. The fact that the restriction does not allow an owner to recover the initial investment does not mean the restriction is constitutionally defective. “Disappointed expectations in that regard cannot be turned into a taking....” Because the ranch failed to show there was no other beneficial use for the land, it was not proved that there had been a taking of property without compensation.

CASE STUDY In the case of *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, the Supreme Court indicated that zoning would be a “taking” under the Fifth Amendment requiring compensation if it completely deprives the owner of all economically beneficial use in the property or results in a permanent physical invasion of the property.

CASE STUDY The case of *Lucas v. South Carolina Coastal Council* (1992) 112 S. Ct. 2886 involved a real estate developer, Lucas, who paid \$975,000 for two residential lots 300 feet from the beach. While Lucas was developing plans, the legislature enacted the Beachfront Management Act that created the South Carolina Coastal Council. The council prohibited development on the Lucas lots, which were within a “baseline critical area.” There were homes on the adjoining lots.

The trial court found that the new law rendered the lots valueless and ordered compensation to Lucas. The South Carolina Supreme Court reversed, holding that payment to Lucas was not required because the primary purpose of the law was to prevent the nuisance of public harm from storm or water damage. The U.S. Supreme Court reversed, holding that this was a total regulatory taking and it must be compensated. This ruling requires payments when government regulations prohibit all economically beneficial use of land. It does not, however, allow owners to use their land for activities that will harm adjacent landowners, nor will it stop regulations that prohibit specific uses, as long as some other economic use is available.

State law now allows duplexes to be built in areas zoned for single-family homes and allows for homeowners to add accessory units, even though the area is reserved for single-family units. The reason for these exceptions is to help alleviate a severe housing shortage.

Types of Zoning

Besides zoning categories, such as residential, commercial, and industrial, there are a number of types of zoning.

Cumulative zoning allows all more restrictive uses. For example, an area zoned for multiple-family use would allow single-family homes as well if the zoning were cumulative.

Noncumulative zoning allows only the use specified. Most zoning today is noncumulative.

Exclusionary zoning prohibits specified uses. Restrictions on condominium conversions are exclusionary zoning.

Cities and counties cannot prohibit mobile homes on foundations on lots that are zoned for single-family dwellings.

Restrictions that prohibit an owner or an owner's agent from erecting a For Sale sign of reasonable dimensions are void as unreasonable restraints on alienation.

CASE STUDY In *City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, a city ordinance required special-use permits for hospitals for the mentally disabled. Cleburne Living Center wished to operate a group home for 13 men and women with mental disabilities. The center was required to apply for a special-use permit. The city denied the application.

The U.S. Supreme Court rejected the argument that people with mental disabilities were a "quasi-suspect classification." The city did not require conditional-use permits for other types of group housing, such as boardinghouses, fraternity houses, and apartment houses. The Supreme Court held that requiring a special permit was unconstitutional in that it violated the equal protection clause of the Constitution by discriminating against people with mental disabilities.

Note: The dissenting opinion indicated that the case could require a city to justify distinctions in its zoning.

CASE STUDY The case of *Hernandez v. City of Hanford* (2007) 41 C. 4th 279 involved the City of Hanford, which amended its general plan to provide for a planned commercial district. The new zoning ordinance prohibited sale of furniture in the district, with the exception that department stores having at least 50,000 square feet could sell furniture within a 2,500 square-foot display area.

Hernandez leased space within the district before the new zoning, but the certificate of occupancy granted several months later included the prohibition as to furniture sales.

The alleged purpose of the zoning was to preserve a downtown furniture district. (There were 12 furniture stores in the downtown area, and the new district was planned to attract large chain stores.)

While the superior court upheld the constitutionality of the ordinance, the Court of Appeal reversed. The court indicated that while the general prohibition of the sale of furniture was related to the legitimate government purpose of retaining the economic viability of a downtown area, its exception permitting large department stores to sell furniture violated equal protection principles in that distinction was made between large and small stores.

The California Supreme Court reversed. They held that preservation of a downtown district for the benefit of the municipality is a legitimate exercise of police power.

Determining where a particular type of business can locate is a traditional zoning objective. The limited exception was for a second legitimate purpose, to attract and retain large department stores that typically carry furniture.

The court determined that the equal protection clause (14th Amendment) does not preclude a governmental entity from adopting legislation to achieve multiple objectives even when the objectives are partially in conflict.

Inclusionary zoning requires that a development include some feature, such as a percentage of units designated for low-income housing.

CASE STUDY In the case of *California Building Industry Assn. v. City of San Jose* (2015) 61 C.A. 4th 435, the California Supreme Court upheld the inclusionary zoning of the City of San Jose. San Jose required all new residential developments of 20 units or more to set aside 15% of the units as below-market affordable housing. The ordinance was invalidated by the trial court as an unconstitutional taking.

The Court of Appeal reversed and the supreme court concurred, ruling that enforcing these requirements to address an affordable housing problem was constitutionally legitimate.

Note: The U.S. Supreme Court did not accept this case for review.

Bulk zoning is zoning for density through height restrictions, open-space requirements, parking requirements, ratios of floor space to total area, et cetera.

Comprehensive zoning is zoning of a large area. A broad plan of zoning, such as a general plan, would be included in this category.

Partial zoning is zoning part of an area without considering its effect on the rest of the area.

Aesthetic zoning is zoning for beauty through regulations governing signs, architectural styles, and even colors.

Incentive zoning can be a boost to building by allowing a use, such as commercial stores on the first floor of a multistory office or residential structure, or a greater height if a public plaza is included.

Spot zoning allows the zoning of individual parcels that are not in conformance with the general area zoning. Spot zoning is often the result of political influence. Spot zoning that is arbitrary and discriminatory will not be upheld by California courts.

CASE STUDY *Ross v. City of Yorba Linda* (1991) 1 C.A.4th 954 involved a family that owned a home on a 1.117-acre lot with zoning for one house per acre. The family wished to divide the property into two lots and build an additional home. Its request for rezoning was denied despite the fact that most of the surrounding property was zoned for one house per one-half acre. The court held that the restriction requiring one acre was arbitrary and discriminatory and therefore unconstitutional. The Court of Appeals affirmed the trial court, pointing out that spot zoning is one of the zoning categories that California courts typically hold as invalid and unreasonable.

Downzoning is a change in zoning to a more restrictive use.

CASE STUDY The case of *Avenida San Juan Partnership v. City of Santa Clemente* (2011) 201 C.A.4th 1256 involved a plaintiff who purchased a 2.83 acre parcel that allowed for four houses. The zoning was later changed to allow only one house per 20 acres. An application for permits for four homes was denied. The developer sued for inverse condemnation.

The trial court ruled that the change in zoning was spot zoning and was made because the city and the neighbors wanted it as open space. The trial court awarded the developer \$1,316,967 in damages for loss of use of the property plus \$227,150 in attorney fees.

The Court of Appeal affirmed but ordered a retrial as to damages. Damages were based on the property having no economic value when the value for a single residence should have been considered.

Note: Downzoning can be viewed as regulatory confiscation and can be costly to municipalities.

Upzoning is a change in zoning to a less-restrictive use, such as allowing more units.

Rezoning is an actual change in the zoning category.

Variance

A **variance** is a special exception to the zoning, although the zoning is not changed. It usually is granted to prevent hardship, where strict application of the zoning would deprive an owner of benefits available to other, similar property owners. For example, a preexisting lot that does not meet the size requirements to build a home under the zoning might be granted a variance.

Conditional-Use Permit

Unlike a variance, which is simply an exception to the zoning, a **conditional-use permit**, or **special-use permit**, allows a use not permitted to every parcel. It is not granted because of owner hardship but because allowing the use in the area is considered to be in the best interest of the community. An example would be to allow warehouses in an area that was designated for dock use and ship repair.

CASE STUDY In *Griffin Dev. Co. v. City of Oxnard* (1985) 39 C.3d 256, an Oxnard city ordinance required every condominium to contain at least 1,000 square feet; have two separate bedrooms; have space for a washer and a dryer; have two garage spaces plus one visitor parking space; and have a private storage area.

Griffin wished to convert his 72 apartment units into condominiums and was denied a special-use permit.

The California Supreme Court rejected Griffin's argument that denial of a permit denied him due process because it was not a change in use. The court held that the city had legitimate objectives in preserving rental houses, as well as justification for different standards for condominiums and apartments. Because condominiums were expected to be a major source of housing for low-income and moderate-income buyers, the city could impose standards for condominiums different from those for apartments. The court held the regulations to be the proper exercise of police power and not confiscatory.

CASE STUDY The case of *Autopsy/Post Services, Inc. v. City of Los Angeles* (2005) 129 C.A. 4th 521 involved APS, which purchased a building in a zone on Foothill Boulevard that required at least 70% of the first floor to be used for retail, restaurants, or offices. APS obtained a building permit for a medical laboratory. APS applied for a sign permit for a sign showing “1-800-Autopsy.” The sign application was rejected, and the city revoked the previously granted permit that was approved in error.

APS sued, alleging it had a vested right to the building permit. The superior court ruled that APS had no vested right to a building permit because it did not act in good faith in omitting that it intended to conduct autopsies on the site. The trial court observed that the common understanding of a medical laboratory includes examination and testing of bodily tissue and bodily fluids, delivered in little bottles, not inside a corpse.

APS appealed and the Court of Appeal affirmed, ruling that APS would be operating a morgue or mortuary, which city zoning requires be in an industrial zone. The court noted that there was no off-street parking, so bodies would be transported in and out of the building on the public sidewalk. (APS attempted to mislead the city building permit officials by not fully disclosing the prohibited intended use of the property.)

Nonconforming Use

Zoning generally is not retroactive. Uses that exist before zoning are not automatically excluded by the zoning. These **nonconforming uses** generally are allowed to continue if they were legal when started. They are said to be covered by the laws of that time (grandfather clause).

CASE STUDY The case of *Jones v. City of Los Angeles* (1930) 211 C. 304 involved a city ordinance that excluded sanitariums within a designated district. The City of Los Angeles sought to enforce the removal of a sanitarium erected before the ordinance. The court held that a properly conducted sanitarium for the care and treatment of people affected with mental or nervous diseases cannot be held to constitute a nuisance. Where a retroactive zoning ordinance causes substantial injury and the prohibited business is not a nuisance, zoning that is retroactive was determined to be an unreasonable and unjustifiable exercise of police power.

The owner of a nonconforming use does not have the right to expand the use. Generally, if the use is abandoned, it cannot be resurrected later. If a nonconforming structure is destroyed, it generally cannot be rebuilt. Courts will generally uphold zoning that allows nonconforming uses to continue for a stated amount of time (amortization period).

CASE STUDY In the case of *City of Stanton v. Cox* (1989) 207 C.A.3d 1557, a municipal zoning ordinance prohibited adult bookstores within 1,000 feet of another similar use or within 500 feet of a school, park, playground, or residence. This left only six available sites in the city. The court held that the ordinance was invalid because it did not provide the owner of an adult bookstore a reasonable opportunity to operate a business in the city. The number of available sites would rapidly decrease if any site were occupied by an adult business.

CASE STUDY In the case of *Ebel v. City of Corona* (1985) 767 F.2d 635, the city passed an ordinance prohibiting adult bookstores and requiring that existing adult bookstores be closed down within 60 days. Ebel, the owner of an adult bookstore, brought this action. The Ninth Circuit Court of Appeals held that the ordinance left Ebel no alternative relocation site and therefore restricted free speech. The court also indicated that 60 days was too short because it did not consider the length of Ebel's lease or her investments.

While zoning does not immediately eliminate a previously existing use, a use that is also a nuisance can be eliminated by an abatement action.

Insuring Zoning

Title insurance is not available to protect owners from changes in zoning. Endorsements are available that ensure that a present use is not in violation of the then-current zoning or that the current zoning is as stated.

In an action for declaratory relief, an owner can ask the courts to determine the extent of their rights regarding the zoning.

COVENANTS, CONDITIONS, AND RESTRICTIONS

Covenants are private, voluntary restrictions that run with the land. They are promises among landowners that are mutually enforceable. The remedy for a breach of a covenant will be damages or an injunction.

Conditions differ from covenants in that they create a defeasible estate. A breach of a condition subsequent means that title will be lost (usually it will revert to the original grantor or his or her heirs). Because of the harsh penalty of forfeiture, courts will construe conditions narrowly and, if at all possible, will determine that a covenant rather than a condition was intended.

Covenants, conditions, and restrictions (CC&Rs), also known as *restrictive covenants*, can cover setbacks, lot size, height, building size, outbuildings, materials, colors, landscaping, signs, pets, et cetera. CC&Rs can go beyond zoning because they are private agreements not limited to health, safety, morals, and the general welfare. CC&Rs might set up architectural review committees for approval of plans. The committees' actions must be in good faith to prevail if they are challenged in court. CC&Rs are generally beneficial restrictions in that they tend to keep up property values. CC&Rs can be enforced by anyone subject to them.

CASE STUDY In the case of *Martin v. Bridgeport Community Association* (2009) 173 C.A. 4th 1024, homeowners allowed their daughter and son-in-law to occupy a property in exchange for making the mortgage payments. The tenants had a dispute with the homeowners association (HOA) about landscape issues and claimed a breach of the CC&Rs. The tenants sued and claimed they had an assignment of rights from the owners. The trial judge ruled against the tenants and awarded the HOA \$30,000 in attorney fees.

The Court of Appeal affirmed. The tenant had no standing to sue. You must have a real interest to litigate. CC&Rs are an equitable servitude running with the property. Assignment of rights is meaningless without transfer of the property.

CC&Rs usually are negative covenants, where parties promise not to do something. They are like negative easements because others who are subject to the covenant can get an injunction to make a party cease violating a covenant.

CASE STUDY In *Edmond's of Fresno v. McDonald Group, Ltd.* (1985) 171 C.A.3d 598, the lease on a jewelry store in a shopping mall provided that the lessor would not permit more than one more jewelry store at the Fresno Fashion Fair. The lessor built an addition to the mall and intended to lease to other jewelry stores.

The restriction on additional jewelry stores was a bargained-for restrictive covenant, and allowing additional competitors would reduce the benefits bargained for. The court held that the covenant of good faith and fair dealing required that the restrictive covenant apply to the addition. If an ambiguity in what constituted "Fresno Fashion Fair" were present, the court held it should be resolved against the lessor, who drafted the instrument. A permanent injunction prohibiting the lessor from entering into additional jewelry store leases was granted.

CC&Rs also can be affirmative covenants, where a party is required to do something, such as build a structure or construct a fence within a stated period of time.

When CC&Rs and the zoning are at variance, whichever is more restrictive generally will prevail.

Creation of CC&Rs

CC&Rs involve rights in real property, so the statute of frauds requires that they be in writing.

Normally, CC&Rs are created by subdividers, who record the CC&Rs as a **declaration of restrictions** and then incorporate them by reference into every deed. After they are made a matter of record, the CC&Rs run with the land. Unless stated otherwise, CC&Rs have no time limitation.

The CC&Rs might provide for new restrictions or changes in the restrictions by agreement of a stated percentage of the property owners. In the absence of any such agreement, any change could require unanimous agreement. Owners of parcels also can agree among themselves to restrictions on use.

To become a matter of record and binding on future owners, the CC&Rs must be recorded in the county where the property is located. Thus, CC&Rs can be discovered through the county recorder's office or through a title company. Buyers of condominiums must be given a copy of the CC&Rs as well as the bylaws of the condominium association and the articles of incorporation. An owners association must furnish an owner with a copy of the CC&Rs within 10 days of the owner's request.

Unenforceable Restrictions

Courts will not enforce every restrictive covenant:

- A restriction against public policy will not be enforced. For example, a restriction whose purpose is to give one party a monopoly will not be upheld.
- Local governments are prohibited from enacting any ordinance or regulation that prohibits the installation of drought tolerant landscaping, synthetic grass, or artificial turf on residential property. (Local governments cannot impose a fine for failure to water a lawn or having a brown lawn.)
- A restriction barring solar energy systems would be unenforceable in that it conflicts with Government Code Section 65850.5 et seq. That requires city or county governments to permit solar energy systems unless they adversely affect public health or safety.
- Common interest developments may not prohibit the posting or display of noncommercial posters that are 9 feet square or smaller in size, or banners and flags that are not more than 15 feet square in size. Civil Code Section 1353.6 was enacted to protect free speech.
- Racial restrictions are void and unenforceable. They have been held to violate the equal protection clause of the Fourteenth Amendment (*Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.C. 836). (When providing CC&Rs containing racial restrictions, the real estate agent must stamp in 20-point, boldface, red type that such restrictions are void. Homeowners associations are also required to remove racial restrictions from their CC&Rs.)

A property owner may have an unlawful restrictive covenant that is based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry stricken from their deed by the county recorder.

- Unreasonable restraints on alienation will not be upheld. In addition, the rule against perpetuities prohibits restrictions on alienation beyond the life of a living person plus 21 years. The interest must also vest (become definite) or terminate within 90 years of its creation. Therefore, grantors may not require that a property remain with their blood heirs forever.
- Restrictions that require an illegal use are invalid.
- If a person seeking to require another to comply with the restrictive covenants is also in violation of the restrictive covenants, the courts will not grant relief. The person must be in compliance to enforce CC&Rs on others. This equitable principle is known as the “clean hands doctrine.”
- Failure to enforce other violations in a timely manner may waive the right to enforce a violation of the CC&Rs later.
- Laches can prevent enforcement. If, because of a failure to enforce, a party acts to their detriment, the court might consider that allowing enforcement would not be equitable. An example of laches would be allowing another to build a structure, with your knowledge, that is not in compliance with the CC&Rs. Waiting until the building was completed before objecting could be considered laches, because the delay allowed others to act to their detriment.
- The statute of limitations for bringing action against a restriction is five years from the time of discovery (or when it should have been discovered using reasonable diligence). (Civil Code Section 784.)
- Courts will not allow enforcement of CC&Rs when conditions have changed. For example, what was previously a rural area with CC&Rs allowing only residential use could now be in the center of a commercial area where residential use could be impractical. A zoning change by itself would not be enough to prove changed conditions, but a change in zoning is evidence of changed conditions.
- Tenants, as well as homeowners subject to restrictive covenants, may not be prohibited from installing satellite dishes within the area of the homeowners’ or tenants’ control.

CASE STUDY The case of *Liebler v. Point Loma Tennis Club* (1995) 40 C.A.4th 1600 involved the plaintiff, Liebler, who owned a condo unit. Liebler leased the unit. The lease provided that Liebler was a cotenant even though Liebler did not live in the unit. Based on this lease, Liebler used the tennis courts. The CC&Rs provided that the tennis courts were only for residents and their guests.

The association fined Liebler in accordance with its rules.

The superior court found that the rules were reasonable and that the association acted properly in fining Liebler. The Court of Appeal pointed out that when CC&Rs are uniformly enforced, they are presumed to be reasonable. The non-resident-use restriction was therefore reasonable and fairly enforced against all owners.

Note: The cotenancy in the lease was an obvious attempt to avoid the restriction on use.

Ending Restrictions

Restrictive covenants automatically cease with

- time, if they were set up for a particular number of years;
- merger, when all the parcels are brought together under one ownership;
- agreement, when the owners, subject to the restrictions, agree to end them;
- foreclosure of a prior encumbrance; a trust deed against the property before the CC&Rs would remove them by its subsequent foreclosure; and
- condemnation by government authority; taking by eminent domain would remove all private restrictions.

REGULATION OF SUBDIVISIONS

The Subdivision Map Act

The **Subdivision Map Act** provides for local control of subdivisions. Every city and county is required to adopt an ordinance to regulate subdivisions. According to the Subdivision Map Act, a subdivision is any division of contiguous land for the purpose of sale, lease, or financing. The map act is concerned with the physical aspects of a subdivision, such as access, streets, drainage, sewage, water, electricity, phones, gas, and schools. Dedication of land for streets, parks, and school sites can be a requirement for map act approval. For school sites, the subdivider may be paid actual site costs for the land dedicated.

If a subdivision contains 50 or fewer parcels, the subdivider can be required to pay a dollar amount per parcel for recreational areas rather than dedicate land.

For subdivisions of fewer than five parcels, the local control is limited to the dedication of rights-of-way, easements, and the construction of reasonable offsite and onsite improvements.

Condominiums and community apartment projects, as well as conversions to these uses, are covered by the Subdivision Map Act.

Exceptions A tentative and a final map must be prepared for all subdivisions creating five or more parcels. Excepted are

- original parcels of fewer than five acres, where each parcel to be created will abut a publicly maintained road and no dedications or improvements are required;
- subdivisions in which each parcel created has a gross area of 20 acres or more and has an improved access to a publicly maintained road;
- commercial or industrial developments that have approval of streets and access; and
- parcels of 40 acres or more.

These exceptions apply only to the filing of a map, not to obtaining local approval. In cases where a tentative and a final map are not required, a parcel map is required.

Conveyances to a government body are not considered conveyances of land for the purpose of the map act.

Tentative Map The tentative map will contain

- a legal description sufficient to ascertain the boundaries;
- the location, names, and widths of all adjoining streets;
- the width and proposed grades of all streets within the proposed subdivision;
- the width and location of all existing and proposed easements for roads, drainage, sewers, and other public utilities;
- tentative lot layout and dimensions of each lot;
- the approximate locations of all areas subject to inundations or storm-water overflow, and the locations, widths, and direction of flow of all watercourses;
- the source of water supply;
- the proposed method of sewage disposal;
- the proposed use of the property;
- the proposed public areas, if any; and
- the approximate contours when the topography controls street layout.

After the tentative map is submitted, the planning agency investigates and reports on the proposed tract. Copies are submitted to the health department, road department, flood control district, recreation department, school authority, and other governmental bodies, as well as to any adjacent communities so they can make recommendations. The department reports are studied, and the subdivider may be required to meet with representatives of interested departments.

The planning commission (a local advisory agency) makes a written report to the local legislative body within 50 days of the filing of the tentative map. It may approve, conditionally approve, or disapprove the map. If no action is taken by the local advisory agency, the tentative map is considered approved.

The subdivider may appeal actions of the advisory agency to any appeal agency or, if none, to the city council or county board of supervisors. Before going to the courts, a subdivider must have exhausted all administrative remedies. Courts generally will overrule administrative determinations only if they were arbitrary or capricious.

Final map After approval or conditional approval, a final map is prepared under the direction of a registered civil engineer. Before approval of the final map, the subdivider may be required to make improvements, provide bonds, or provide some other security so that improvements will be made.

The final map, along with all required signed certificates, is filed, and the governing body approves it at the meeting following filing. The final map is then recorded. By filing the final map, the local agency certifies that its requirements have been met.

Conveyances that do not comply with the act are voidable, at the option of the grantee, within one year of the date of discovery of the violation. The grantee can recover damages.

Local agencies will not issue any permit to develop real estate that was divided without approval unless the local agency determines that the division complies with all requirements.

Government Code Section 66499.30 (e) allows property to be sold or leased before the issuance of the final map, as long as the final closing is conditioned on the filing of the final subdivision or parcel map.

Development Impact Fees

Government Code Section 66000-6602.5, known as the Mitigation Fee Act, authorizes local government agencies to charge a fee as a condition of approval of a development plan. The purpose of the fee is to defray all or a portion of the costs of public facilities related to the development. The fee must be reasonably related to the cost of services provided by the local agency. If the fee exceeds the reasonable cost of providing public service, then the fee would be considered a special tax, which must receive two-thirds voter approval. Fees vary by municipality and in 2021, ranged from \$0 to \$60,000 per residential unit.

Subdivided Lands Law

Subdivided land sales fall under the jurisdiction of the Department of Real Estate. The primary purpose of the **Subdivided Lands Law** (Business and Professions Code Section 11000 et seq.) is to protect purchasers in new subdivisions from fraud, misrepresentation, or deceit in the marketing of subdivided lots, parcels, units, and undivided interests. The disclosures provide the buying public with knowledge of essential facts so that an informed decision to purchase can be made.

A subdivision under the Subdivided Lands Law is a division of five or more parcels for the purpose of sale, lease, or financing. The law applies to subdivisions located within the State of California. For out-of-state subdividers, the real estate commissioner must make a determination that the offering is fair, just, and equitable.

The differences and similarities between the Subdivision Map Act and the Subdivided Lands Law are shown in Figure 13.1.

“Four-by-fouring” is an attempt to evade the subdivision laws by breaking a parcel into four parcels and selling them to separate people or entities who again break them into four parcels, and so on. This is regarded as a violation of the subdivision laws and will subject the violator to both civil and criminal penalties.

CASE STUDY The case of *People v. Byers* (1979) 90 C.A.3d 140 involved a father who attempted to avoid the subdivision requirements by transferring portions of his property to his son and others. The grantees then broke each parcel into four parcels, and they were sold, with the father receiving the proceeds. The father fled to avoid prosecution, but the son and two others were tried. The court indicated that the object of the subdivision law was to prevent sharp practices and fraud. The court refused to excuse the acts on the grounds that the parties believed that their actions were lawful. The defendants were found guilty of aiding and abetting a criminal act.

FIGURE 13.1: Subdivision Map Act and Subdivided Lands Law

Subdivision Map Act	Subdivided Lands Law
<ul style="list-style-type: none"> • Local control • Improved residential subdivisions within city limits (lots sold with residencies) included • Two or more lots or parcels • "Proposed division" excluded • Parcels must be contiguous • No exemptions for 160 acres and larger • Community apartments included • Condominiums included • Stock cooperatives not included unless a conversion of five or more existing dwelling units • Leasing of apartments, offices, stores, or similar space in apartment buildings not included; industrial and commercial buildings are not included • Long-term leasing of space in mobile home parks or trailer parks exempt • Undivided interests exempt • Expressly zoned industrial and commercial subdivisions included • Agricultural leases exempt • Time-shares exempt • Limited-equity housing cooperatives exempt • Out-of-state subdivisions sold in California exempt 	<ul style="list-style-type: none"> • Bureau of Real Estate control • Excluded • Five or more lots or parcels • "Proposed division" included • Parcels need not be contiguous • Parcels of 160 acres or more exempt • Included • Included • Stock cooperatives included • Leasing of apartments, offices, stores, or similar space in apartment buildings included; industrial and commercial buildings not included • Included • Included • Exempt • Included • Included • Included • Included

Public Report

Generally, no subdivision can be offered for sale in California until the real estate commissioner has issued a **public report**. The public report will not be issued until the commissioner is satisfied that the subdivider has met all statutory requirements, with particular emphasis on the financial arrangements to ensure completion and maintenance of improvements and facilities included in the offering, and shown that the parcel can be used for the purpose offered. Map act requirements also must be met before the issuance of the public report.

Public reports are disclosure statements. They include information on location, the size of the offering, the identity of the subdivider, and the interest to be conveyed to the purchaser or lessee, as well as provisions for handling deposits, purchase money, taxes, assessments, etc. Also included are use restrictions, unusual costs that a buyer will have to bear at the time of purchase or in the future, hazards or adverse environmental findings, special permits required, and utilities availability. The report is intended to provide information to aid a potential buyer in making a purchase decision.

Before being obligated, purchasers must sign a receipt that they have received and read a copy of the public report. Public reports also must be given to any member of the public upon request. A copy and notice of its availability must be posted in the subdivision sales office.

A public report is good for five years from the date of issuance. Material changes that would cause the public report to no longer to reflect the true facts must be reported to the commissioner. Material changes also would include changes in sales contracts or instruments of conveyance. The commissioner would revise the public report to reflect the true conditions.

Business and Professions Code Sections 11016.6 and 11018.1 provide that at the same time a public report is provided, a specified statement titled “Common Interest Development General Information” must be given to the purchaser. Note that the term *common interest development* is now being used for subdivisions having areas in common, such as condominiums.

Preliminary public report A **preliminary public report** (known as the “pink slip”), which allows the subdivider to take refundable deposits or reservations for sales, may be issued by the commissioner.

A preliminary public report is good until the final report is issued, but not for more than one year.

Conditional public report Section 11018.12 was added to the Business and Professions Code to provide for a new category of public report. In the past, the subdivider could not enter into any binding contract until the public report (“white slip”) was issued. Now, however, the **conditional public report** allows a subdivider to enter into a binding contract with a buyer, but an escrow must be opened, and the funds are not to be released to the subdivider or the escrow closed until the final public report is issued. The requirements for the conditional public report are more stringent than for the preliminary public report. The term for the conditional public report cannot exceed six months and may be renewed for one additional six-month period if the commissioner determines that the conditions for issuance of the public report are likely to be satisfied during the renewal term.

If the final public report is not issued within the term of the conditional public report, or if the purchaser is dissatisfied with the final public report because of a material change in the setup of the offering, the entire sum of money paid or advanced by the purchaser must be returned to the purchaser.

Interstate Land Sales Full Disclosure Act

The federal **Interstate Land Sales Full Disclosure Act** is administered by the Office of Interstate Land Sale Registration (OILSR) of HUD. A disclosure statement known as the *property report* is required for subdivisions of 100 or more unimproved residential lots offered for sale in interstate commerce. Exempt from the act are parcels of five acres or more, cemetery lots, and sales to builders. The disclosure statement sets forth material facts about the development that must be provided to the purchaser before sale. The California public report satisfies this disclosure requirement.

Purchasers have a seven-day right of rescission after signing the purchase agreement.

The act provides civil and criminal remedies for its willful violation. Purchasers have three years after discovery of violations to bring actions for fraud.

ENVIRONMENTAL LAW

National Environmental Policy Act (NEPA)

The federal **National Environmental Policy Act** (42 U.S.C. 4321 et seq.) applies to federal agencies and legislation “significantly affecting the quality of human environment.”

Federal action requires an environmental impact statement (EIS) if the action significantly affects the quality of life. The EIS gathers relevant data along with an analysis of its effects. The website of the Environmental Protection Agency is www.epa.gov.

WEB LINK



CASE STUDY In *No GWEN Alliance v. Aldridge* (1988) 855 F.2d 1380, the Ninth Circuit Court of Appeals held that an environmental impact statement prepared by the U.S. Air Force for the installation of a communications system need not address the environmental impact of nuclear war. (The communications system was intended to transmit messages during and after a nuclear attack.)

California Environmental Quality Act (CEQA)

California’s law, the **California Environmental Quality Act** (Public Resources Code 21000 et seq.), allows local government agencies to require environmental impact reports for private and government projects that may have a significant effect on the environment (Public Resources Code Section 21151).

The city or county authorities are responsible for determining whether an **environmental impact report (EIR)**, which analyzes any adverse impact of development, how it can be reduced, and alternatives, is needed. The Phase 1 report is the draft report submitted for evaluation, and the Phase 2 report is the final version.

A **negative declaration** is a declaration by the city or the county that the development will not have a significant adverse effect on the environment. When such a declaration is filed, an environmental impact report is not required.

An important feature of the California act is that private citizens can challenge a project in court if they feel that proper procedures were not followed or that the report was incomplete.

Alquist-Priolo Special Studies Zone Act

A special studies zone is a geological hazard zone on a potentially active earthquake fault line. Zones customarily are one-quarter of a mile or more wide, centering on the fault. The **Alquist-Priolo Special Studies Zone Act** (Public Resources Code Section 2621 et seq.) requires that geological reports be obtained for project approvals within the zones and that prospective purchasers of property in the zones be made aware of the facts.

Coastal Zone Conservation Act

To develop land within a designated coastal zone, either a coastal development permit or an exemption from the provisions of the **Coastal Zone Conservation Act** (Public Resources Code Section 27000 et seq.) is required. The coastal zone includes about 1,800 square miles. It averages approximately 1,000 yards in width, with wider spots in coastal estuaries, marine habitat, and recreational areas. The purpose of the act is to protect the coastal zone and the marine environment, and to ensure public access to the coast.

CASE STUDY In *Grupe v. California Coastal Commission* (1985) 166 C.A.3d 148, Grupe wanted to build a single-family home on coastal land. The coastal commission issued a permit conditioned on Grupe's offering to dedicate an access easement to the coast over two-thirds of his land.

Grupe argued that requiring the dedication would be valid only if it related to a public need. The court held that while Grupe's house alone did not create a need for public access, the house was but one of several projects that collectively would create a need for public access.

The local government agency must issue a permit before development within the coastal zone. A person can appeal local rulings to the state coastal commission.

CASE STUDY In the case of *Nollan v. California Coastal Commission* (1987) 107 S. Ct. 3141, Nollan wished to demolish an oceanfront cottage to build a new residence. The California Coastal Commission conditioned its approval on Nollan's granting a public easement along the beach area. The U.S. Supreme Court held that in this case, requiring an easement was a taking of property, which requires consideration, because there was no connection between the building permit and the easement.

This case differs from the *Grupe* case because *Grupe* involved access to the ocean. In *Nollan*, the public had access to the beach, but the coastal commission wished to establish public use of the beach area belonging to *Nollan*.

CASE STUDY In the case of *Ocean Harbor House Homeowners Association v. California Coastal Commission* (2008) 163 C.A. 4th 215, the California Coastal Commission imposed a mitigation fee of \$5 million upon a homeowners association as a condition for approval of a permit to build a seawall to protect condo units.

The Court of Appeal pointed out that a permit condition was derived from the power to deny a permit. However, the permit condition must be related to the impact of permit approval. In this case, the Court of Appeal determined that the fee was proper considering loss of recreational use, effect on sand erosion, and costs. The fee requirement was proper.

CASE STUDY The case of *AVCO Community Developers Inc. v. South Coast Regional Commission* (1976) 17 C.3d 785 concerned a developer who spent more than \$2 million for storm drains, culverts, streets, utilities, et cetera, based on county zoning and map act approval. The developer also had sold 11 acres of prime sand beach to the county at a price below market value and had dedicated additional land for access. When the California Coastal Act became effective, the developer was denied the right to develop the property. The California Supreme Court held that a developer is not considered to have a vested right to develop unless a building permit has been issued, which was not the case.

The legislature apparently considered the *AVCO* decision inequitable. It enacted Sections 65864–65869.5 of the Government Code, which provides for development agreements where the developer and the city agree to use, density, height, size, dedications, et cetera. These agreements are to be enforceable, notwithstanding subsequent changes to the specific plan, zoning, subdivision, or building regulations.

CASE STUDY The case of *Feduniak v. California Coastal Commission* (2007) 148 C.A. 4th 1346 involved the enforceability of coastal zone regulations. In 1983, the California Coastal Commission issued a permit for a new house located in an environmentally sensitive habitat area. The permit, given to the Bonannos, required an open-space easement and the use of native landscaping on the property. After receiving their permit, the Bonannos changed their approved landscaping plan to include a three-hole golf course. They did not seek approval for this change.

In 2000, the Feduniaks purchased the property because they loved the golf course. The Bonannos did not inform them of the easement and permit requirements. Although they were recorded, the title report failed to disclose the easement and restrictions.

In 2003, the California Coastal Commission issued a cease and desist notice and directed the Feduniaks to remove the golf course and restore the grounds to the dunes vegetation native to the Monterey County Coast.

The Feduniaks petitioned for a writ of mandamus, claiming the commission's actions were invalid. The claim that designated the property as an environmentally sensitive habitat area was improper, and even if valid, the commission was estopped from enforcing the restrictions and easement. The trial court held that the commission should have known that the golf course violated the easement and permit restrictions and that an 18-year delay in inspecting for compliance was unreasonable.

The Court of Appeal reversed. The court pointed out that the commission had no duty to inspect the property for compliance, nor did the evidence support the fact that the Feduniaks could reasonably rely on failure to enforce restrictions as abandoning the right to do so. The failure to enforce the law does not estop the government from subsequent enforcement.

Note: The Feduniaks likely had legal remedies against the Bonnanos and the title company.

Endangered Species

The federal **Endangered Species Act** can halt development if, for example, a family of owls, a rare bird, or a new species of lizard are discovered. Even an obscure minnow can prohibit the construction of a dam. Once a plant or animal is placed on the endangered list, it can place onerous restrictions on the owner of the property.

Historical Designations

Federal law and local ordinances provide for **historical designations**—the designation of structures having historical significance could prohibit redevelopment. In some cases, redevelopment or exterior modification is allowed if the structure is relocated to an approved site.

BUILDER AND DEVELOPER LIABILITY

A developer who manufactures a lot has strict liability in tort for damages that are the proximate cause of any defect in design or manufacture. Manufacturers (subdividers) will be liable even in the absence of any fault on their own part (*AVNER v. Longridge Estates* (1982) 272 C.A.2d 607).

Because product liability law applies to the manufacture of lots, neither precautions, nor care, nor warnings to a purchaser will protect the manufacturer from resultant damages.

Suits for latent defects in the development of lots can be brought for up to 10 years after the completion of improvements (but within 3 years of discovery of damage) (Code of Civil Procedure Section 338). California Civil Code Section 900 requires that a builder provide a homebuyer with a minimum of a one-year written warranty covering standards set forth in Civil Code Section 896. Builders who offer an “enhanced protection agreement” beyond the one-year minimum may not limit the standards of Section 896.

Besides express warranties, a builder can be held liable for breach of implied warranties that the construction was done in a workmanlike manner and is fit for the intended use.

A homeowner cannot sue a builder for construction deficiencies until the builder has been notified of the defect and given the opportunity to correct (Civil Code Section 910).

For builder liability, there is a 4-year statute of limitations for patent defects (Code of Civil Procedure Section 337.1) and a 10-year statute for latent defects (Code of Civil Procedure Section 337.15).

Builder liability would not apply for speculative losses where risks of harm are not foreseeable.

CASE STUDY In the 1989 case of *La Jolla Village Homeowners' Assn. Inc. v. Superior Court* 212 C.A.3d 1131, the court refused to extend the strict liability of mass producers of homes to their subcontractors. However, the California Supreme Court extended the strict liability of mass builder to component manufacturers. The court held that a manufacturer of defective window units was liable for damages caused as the result of the defect. In this case, damages extended to the stucco, insulation, framing, drywall, paint, wall coverings, floor coverings, and other parts of the homes.

SUMMARY

Zoning is public control of land use enacted under the police power of the state for the health, safety, morals, and general welfare of the population. Zoning can be appealed to the courts but will be overturned only if found to be arbitrary or capricious.

When zoning is changed to a more restrictive use, California courts will not award the owner damages; they do not consider it a taking of property.

Types of zoning include

- cumulative zoning (zoning that allows more restrictive uses),
- noncumulative zoning (zoning that allows only the uses provided by the zoning category),
- exclusionary zoning (zoning that prohibits specified uses),
- bulk zoning (zoning for density),
- comprehensive zoning (zoning of a large area),
- partial zoning (zoning of an area without considering its effect on other areas),
- aesthetic zoning (zoning for beauty),
- incentive zoning (zoning that allows a greater use as an incentive to build or to provide some desired feature),

- spot zoning (zoning a parcel so it is not in conformance with surrounding property),
- downzoning (a zoning change to a more restrictive, use such as from R-4 to R-2), and
- rezoning (a change in the zoning category).

A conditional-use permit allows an exception to the zoning in the best interests of the community.

Zoning will not be retroactive. A nonconforming use will be allowed to continue, although the zoning could provide an amortization period, after which the use must cease.

Covenants, conditions, and restrictions are private restrictions that run with the land. Normally, they are created by subdividers, who record a declaration of restrictions and then incorporate the declaration by reference in every deed. They also could be created by a recorded agreement of a group of owners.

The Subdivision Map Act allows local control of subdivisions. A tentative map is prepared by the subdivider. Local recommendations may be made for modifications. After all approvals, a final map is prepared and recorded.

The Subdivided Lands Law, a disclosure law intended to protect the public, provides for Department of Real Estate approval of subdivisions having five or more parcels. Buyers are not required to go through with a transaction until they have read (and signed that they have received) a copy of the public report (disclosure report). Purchase reservations may be taken with a preliminary report, which is good for one year or until the public report is issued. Binding contracts can be made with buyers after a conditional public report is issued, but funds will not be released and escrow closed until the final public report is filed.

The Interstate Land Sales Full Disclosure Act is a federal law for 100 or more unimproved residential lots offered for sale in interstate commerce. The California public report satisfies the disclosure requirement. Purchasers have a seven-day right of rescission after signing a purchase agreement.

Federal projects significantly affecting the environment require an environmental impact statement that includes an analysis of the project's effect.

California provides that local agencies can require an environmental impact report on projects that will have a significant effect on the environment. Private citizens can challenge the failure to require a report, as well as the completeness of the report.

Purchasers in geological hazard zones must be notified of the proximity of a fault line. Developments within special study zones require special approval.

The Coastal Zone Conservation Act requires approval for coastal zone projects to protect the coastline and environment, and to provide public access.

A developer who manufactures lots has strict liability for defects in design or manufacture. Also subject to strict liability are mass producers of homes.

DISCUSSION CASES

1. A community rezoned a parcel as “high flood danger,” which prohibited all development. A purpose of the rezoning was to make the property available for public use. **What, if any, are the owners’ rights?**

Annicelli v. Town of South Kingston, R.I. (1983) 463 A.2d 133

2. Landowners attacked the validity of a zoning ordinance that rezoned their property as agricultural. They claimed the zoning was arbitrary and inconsistent with the general plan and represented the taking of their property without just compensation. **Considering that the new zoning significantly lowered property values, was this a taking without compensation?**

Pan Pacific Properties Inc. v. Santa Cruz (1978) 81 C.A.3d 244

3. A zoning ordinance prohibited outdoor advertising other than those signs related to the businesses conducted on the site. An outdoor advertising company brought an action claiming that the zoning was unreasonable. **Is the zoning reasonable? If it is not, should it be set aside?**

United Advertising Corp. v. Borough of Metuchen (1964) 198 A.2d 447

4. A zoning ordinance required the discontinuance of a plumbing business after five years. At the time the business was established, the zoning was proper. The owner claimed that the property was suited for this type of business and requiring its removal would be a taking of property. **Do you agree?**

City of Los Angeles v. Gage (1954) 127 C.A.2d 442

5. A deed executed in 1917 contained a covenant that the land was to be used for residential purposes. The restriction was for 50 years. Due to the growth of the area, the property became part of a business district. **Can the restriction on use be enforced?**

Norris v. Williams (1947) 54 A.2d 331

6. The plaintiff wished to operate a rock and gravel operation on land contiguous to a nonconforming-use operation that had become substantially depleted. The adjacent property was zoned for agricultural and residential use, which did not permit a gravel operation.

The trial court determined that the property had great value for rock, gravel, and sand excavation, but very little value for any other purpose. The plaintiff maintained that the zoning was a taking of property without compensation, was discriminatory, was a denial of equal protection, and made the plaintiff’s property worthless. **Was the zoning a proper exercise of police power?**

Consolidated Rock Products v. City of Los Angeles (1962) 57 C.2d 515

7. The city denied the plaintiff a building permit on the basis of the plaintiff's refusal to dedicate land for a street extension that would go through the plaintiff's property. The plaintiff wanted to build over some of this land. **Was the action of the city proper?**

Selby Realty v. City of San Buenaventura (1973) 10 C.3d 110

8. To obtain a landowner's approval to annexation in 1965, the city agreed that the county zoning would remain in effect. In 1971, the city rezoned the property so that a shopping center would not be allowed. **Was the city's action proper?**

Carty v. Ojai (1978) 77 C.A.3d 329

9. A Los Angeles city ordinance provided that approval would not be granted for a condominium conversion if more than 50% of the units were occupied by the elderly, the disabled, or minors, and no reasonable relocation assistance plan was provided.

The plan submitted by the plaintiff allowed continued occupancy by the special tenants until they could be relocated. The city disapproved the conversion because the plan's implementation was prevented by a scarcity of comparable units. **Was the city's action proper?**

Krater v. City of Los Angeles (1982) 130 C.A.3d 839

10. The City of Oakland passed a zoning ordinance that prohibited adult entertainment facilities within 1,000 feet of a residential zone. Existing uses would be allowed to continue for one year, after which they would have to obtain a conditional-use permit. The zoning also provided for an additional two-year period for hardship situations (the lessee was tied to a long lease, or the user had a substantial investment in the structure). **Was the zoning reasonable?**

Castner v. City of Oakland (1982) 129 C.A.3d 94

11. Ten unrelated adults lived in a 24-room house that had 10 bedrooms and 6 baths, plus ample parking. The city sought an injunction for violating a zoning ordinance. The area provided for single-family use and defined a family as either two or more people related by blood, marriage, or adoption living as a housekeeping unit, or up to five unrelated people. **Is this zoning valid?**

City of Santa Barbara v. Adamson (1980) 27 C.3d 123

12. A subdivision's CC&Rs restricted occupancy to single-family residential use. It sought to exclude a residential care facility. (Section 1566.5 of the Health and Safety Code provides that a residential care facility serving six or fewer people should be considered single-family use.) **Can the subdivision exclude this use under its restrictions?**

Welsch v. Goswick (1982) 130 C.A.3d 398

13. The City of Camarillo and Pardee Construction Company entered into a stipulated judgment that Pardee had vested rights to develop a 1,150-acre tract in accordance with approved zoning and the master plan. The city agreed not to adopt any zoning inconsistent with that previously approved.

Relying on this agreement, Pardee Construction Co. spent approximately \$13.5 million for development costs. In June 1981, a voters' initiative limited the number of building permits for the entire city to 400 per year and provided a detailed plan for allocation of permits. **Was Pardee Construction limited in its development by the initiative?**

Pardee Construction Co. v. City of Camarillo (1984) 37 C.3d 465

14. A condominium restriction prohibited the parking of any truck, camper, trailer, or boat of any kind. The carports were restricted to passenger automobiles. The defendant owned a clean, noncommercial pickup truck. The condominium association sued to enjoin the defendant from parking his truck in the carport. **Will the restrictive covenant be enforced?**

Bernardo Vilas Mgmt. Corp. v. Black (1987) 190 C.A.3d 153

15. A homeowners association knew of lighting problems and that crimes had been committed, including a burglary, at the plaintiff's unit. The plaintiff installed her own lighting but was not permitted to use it because it violated the CC&Rs. The plaintiff was subsequently robbed and raped. **Is the homeowners association liable?**

Francis T. v. Village Green Owners Ass'n. (1986) 42 C.3d 490

16. The CC&Rs of a condominium prohibited renting units to tenants (with the exception of roommates). **Is this restriction enforceable by the association?**

City of Oceanside v. McKenna (1989) 215 C.A.3d 1420

17. Carmel-by-the-Sea enacted an ordinance prohibiting residential rentals of less than 30 days. **Was this ordinance a proper exercise of police power?**

Ewing v. City of Carmel-by-the-Sea (1991) 234 C.A.3d 1579

18. A San Diego ordinance limited the maximum number of renters that can occupy a residence. It was based on square footage, bedroom, and bathroom requirements, as well as off-street parking. **Were the restrictions proper?**

College Area Renters and Landlord Association v. City of San Diego (1994) 43 C.A.4th 677

19. A San Francisco ordinance required that owners of residential hotels could not convert them to another type of hotel use. A hotel owners association brought action claiming that the ordinance violated their Fifth Amendment rights in that it was taking without compensation. **Do you agree?**

Golden Gate Hotel v. San Francisco City and County (1993) 836 F. Supp. 707

20. A homeowners association brought action for an injunction against the operation of a residential care facility for nonambulatory adults based on CC&Rs that prohibit commercial use. **Should an injunction be granted?**

Broadmoor San Clemente Homeowners Assn. v. Nelson (1994) 25 C.A.4th 1

21. A hotel was substantially destroyed by fire in November 1988. The owner applied for a demolition permit. The city withheld the permit because it claimed the hotel was an SRO building (single-room-occupancy permanent housing). A city ordinance prohibited SRO demolition unless repair was not feasible and the owner agreed to replace the SRO with similar housing. The demolition permit was finally issued in August 1990, when the city determined the hotel was not an SRO.

During the period before issuance of the permit, the hotel experienced a series of fires. The city determined that the owner was not providing proper security, and therefore the city contracted for 24-hour security. The owner was assessed the costs of \$399,000.

The owner sued for refund of the security costs, as well as lost income. **Should the owner be entitled to this reimbursement?**

Ali v. City of Los Angeles (1999) 77 C.A.4th 246

22. A homeowner's trees blocked an uphill homeowner's view of the Pacific Ocean. The city issued an order compelling the owner to trim the trees and restore the view under a view restoration act. (Under the act, the upper property owner was required to pay for the trimming.) **Is this an uncompensated taking of private property?**

Echevarrieta v. City of Rancho Palos Verdes (2001) 86 C.A.4th 472

23. **Because of the social and economic effects, may a city use its design review ordinance to exclude nationwide retail chains from shopping malls?**

Friends of Davis v. City of Davis (2000) 83 C.A.4th 1004

24. A homeowner built a 200-foot-long, 5-foot-high wrought iron fence around her lot, but the homeowners association's unrecorded regulations specify that fences require advance association approval with exceptions only for low, wooden split rail fences. The association sought a court order to require the woman to seek proper permits or remove the fence. **Is the association regulation enforceable?**

Rancho Santa Fe Association v. Dolan-King (2004) 115 C.A.4th 28

25. A couple purchased two single family dwellings with the intent to demolish them and construct an 11-unit condominium. The City of West Hollywood adopted an ordinance to increase the availability of affordable housing and required developers to sell or rent a portion of new units at below-market rates or pay an in-lieu fee. The developers were charged a fee of \$540,393.28, which they paid under protest and then brought suit challenging the fee as unconstitutional exactments. **Was the fee enforceable?**

616 Croft Ave LLC v. City of West Hollywood (2016) 3 C.A.5th 621

UNIT QUIZ

1. The power to zone was given to cities and counties by
 - a. the U.S. Constitution.
 - b. the Thirteenth Amendment.
 - c. enabling acts.
 - d. the U.S. Supreme Court.
2. *LEAST* likely to be upheld by California courts is rezoning that would
 - a. eliminate any beneficial use of the land.
 - b. result in a reduction of value.
 - c. reduce the use density.
 - d. be downzoning.
3. Zoning that allows a single-family home to be built in an area zoned for apartments is an example of
 - a. downzoning.
 - b. cumulative zoning.
 - c. spot zoning.
 - d. bulk zoning.
4. Covenants differ from conditions in that breach of a
 - a. covenant can be legally enforced.
 - b. condition could result in forfeiture.
 - c. covenant can only be enforced by the HOA.
 - d. covenant can result in forfeiture.
5. Zoning that prohibits adult entertainment within an area is
 - a. inclusionary zoning.
 - b. exclusionary zoning.
 - c. illegal.
 - d. downzoning.
6. Zoning for density is known as
 - a. incentive zoning.
 - b. bulk zoning.
 - c. exclusionary zoning.
 - d. inclusionary zoning.

7. Which is *TRUE* of a nonconforming use?
 - a. It can be retroactive.
 - b. It refers to private restrictions.
 - c. It was a legal use before zoning.
 - d. The use must be allowed to continue for the owner's lifetime.
8. New zoning that prohibits an existing use would *NOT* provide for
 - a. immediate closure.
 - b. the time period for closure.
 - c. prohibition of expansion.
 - d. continuation of use by a nonconforming user.
9. The *MOST* likely action for violation of a deed covenant would be
 - a. action for injunction.
 - b. forfeiture.
 - c. action for specific performance.
 - d. liquidated damages.
10. Which is *TRUE* of restrictive covenants?
 - a. They run with the land.
 - b. If not recorded, they are not binding on a subsequent purchaser without notice.
 - c. They are usually negative covenants.
 - d. All of these are true.
11. Deed restrictions are created by
 - a. the local building commission.
 - b. the planning commission.
 - c. action of law.
 - d. the grantors.
12. A copy of the CC&Rs requested by an owner in a condominium, cooperative, or community apartment project must be furnished within
 - a. 10 days.
 - b. 20 days.
 - c. 30 days.
 - d. 45 days.
13. Which CC&R would *MOST* likely be enforceable?
 - a. One that prohibits resale
 - b. One that prohibits resale for more than a stated price
 - c. One that prohibits resale to a minority buyer
 - d. One that requires property to be used only for religious purposes

14. The Subdivision Map Act is concerned with
 - a. physical aspects of the subdivision.
 - b. protection of the title in the purchaser.
 - c. prevention of seller fraud.
 - d. all of these.
15. The Subdivided Lands Law is concerned primarily with
 - a. preventing objectionable uses.
 - b. providing adequate space.
 - c. protecting purchasers.
 - d. protecting brokers.
16. The Subdivided Lands Law does *NOT* apply to
 - a. California subdivisions.
 - b. Nevada subdivisions sold in California.
 - c. division into four parcels for the purpose of sale.
 - d. condominiums.
17. When three one-acre parcels are to be sold from a nine-acre parcel each year for three years, the sellers must comply with
 - a. the map act.
 - b. the Subdivided Lands Law.
 - c. both of these.
 - d. neither of these.
18. The Subdivided Lands Law covers
 - a. undivided interests.
 - b. out-of-state subdivisions sold in California.
 - c. time-shares.
 - d. all of these.
19. The Subdivision Map Act applies to
 - a. agricultural leases.
 - b. two or more parcels.
 - c. out-of-state subdivisions.
 - d. time-shares.
20. Public reports expire
 - a. five years from the date of the first sale.
 - b. five years from the date of the last sale.
 - c. five years from the date of issuance.
 - d. one year after issuance.

21. A subdivider who has not received a final public report but is able to enter into binding contracts with purchasers has a
 - a. preliminary public report.
 - b. conditional public report.
 - c. variance.
 - d. conditional-use permit.

22. Seven parcels of land were subject to a restrictive covenant limiting use for residential purposes. A woman acquired all seven parcels and intends to build a commercial property in conformance with zoning. Which of the following describes her rights?
 - a. She will not be issued a building permit because the use would violate the restrictions.
 - b. The restrictive covenant is terminated by merger.
 - c. Any former owner can obtain an injunction to stop the project.
 - d. Anyone can enforce the restrictions.

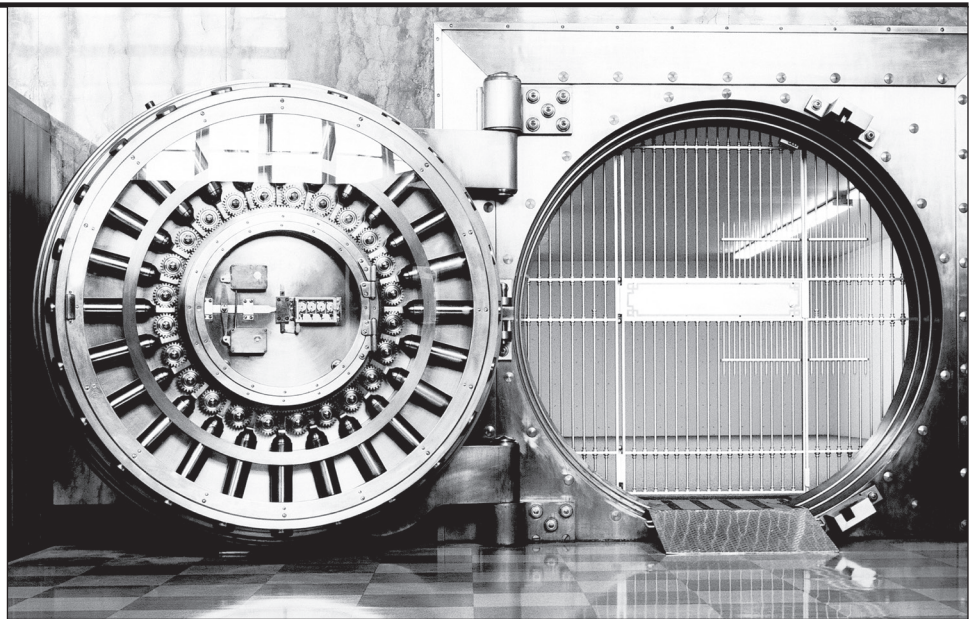
23. Which is *TRUE* of the Interstate Land Sales Full Disclosure Act?
 - a. There is a 60-day right of rescission.
 - b. It applies to 100 or fewer parcels.
 - c. The California public report can be used to satisfy the disclosure requirements.
 - d. All of these are true.

24. The statute of limitations for builder liability is
 - a. 4 years for patent defects and 10 years for latent defects.
 - b. 1 year.
 - c. 3 years.
 - d. 10 years for patent defects and 4 years for latent defects.

25. Excluded from strict liability for defects are
 - a. latent defects.
 - b. developers of lots.
 - c. builders.
 - d. subcontractors.

14

UNIT FOURTEEN



ESCROW AND TITLE INSURANCE

KEY TERMS

abstract of title	escrow instructions	relation-back doctrine
amendments to the escrow instructions	extended-coverage policy of title insurance	standard policy of title insurance
American Land Title Association (ALTA)	interpleader action	title insurance
closing	opinions of title	title plant
elder abuse law	preliminary title report	Uniform Vendor and Purchaser Risk Act
escrows	rebate law	

ESCROWS

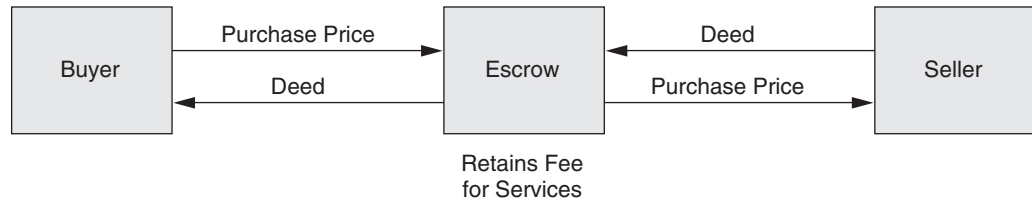
In many states, real estate settlements are conferences attended by buyers and sellers, their attorneys, the real estate agent, and sometimes the agent's attorney. At this **closing**, all documents are signed and monies are paid.

In California, the closing process is simplified by using an independent depository to handle the closing process. **Escrows** are neutral third-party depositories that are limited in authority to the instructions given by the principals.

Section 1057 of the Civil Code defines an escrow as follows: "A grant deed may be deposited by the grantor with a third person to be delivered on the performance of a condition, and on delivery by the depository, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow."

Figure 14.1 illustrates the primary function of the escrow.

FIGURE 14.1: Escrow Function



While the escrow is the process, the escrow agent is the individual holder of the funds (usually an employee of the escrow company). An escrow agent is not an arbitrator or a mediator of disputes. Before the fulfillment of the escrow conditions, the escrow is the dual agent of the buyer and the seller. After the fulfillment of the conditions, the escrow agent is the agent of each of the parties, with separate obligations to deliver the deed to the buyer and to deliver the consideration paid to the seller.

Because an escrow is an agency, the escrow agent should not have any discretionary powers. An essential element of an escrow is the irrevocability of the deposit of both the deed and the purchase money. An escrow never acquires title; the escrow is always an agency.

Within one month of closing, brokers must inform the buyer and the seller of the final selling price. In actual practice, the broker does not do so, because the escrow provides this information in the closing statement.

Escrows are required by law in cases of court-ordered sales, bulk sales, and sales involving the transfer of a liquor license.

Escrow Instructions

In Southern California, both the buyer and the seller customarily sign the escrow instructions. In Northern California, the escrow instructions often are separate documents separately signed by the buyer and the seller. The separate documents cannot contain any difference regarding the escrow's duties. The escrow is not effective until both the buyer and the seller have signed identical or conforming escrow instructions.

In Southern California, the escrow instructions are customarily signed upon opening of the escrow. In some areas of Northern California, the escrow instructions, while given at the opening of escrow, are not signed until escrow closes.

The widely used CAR form *California Purchase Agreement and Joint Escrow Instructions* makes the escrow instructions part of the purchase agreement, so separate escrow instructions are not required (see Unit 6).

Because the real estate broker is not a party to the escrow, the escrow agent cannot change the escrow instructions at the direction of the broker.

For a valid escrow, the signed instructions must be returned to the escrow holder.

Escrow instructions include

- names of purchasers and sellers,
- how title is to be taken,
- terms,
- any contingencies,
- date of closing,
- date of possession (if not specified, possession will be given on the date of closing),
- prorations,
- what documents are to be delivered to escrow,
- the authority to accept documents and funds,
- disbursements to be made,
- costs and charges,
- designation of the title insurance company, and
- items of personal property to be included.

When new financing is involved, the lender will submit its own escrow instructions, so the lender becomes an additional party to the escrow.

The escrow instructions should be clear and unambiguous. It is possible for the escrow instructions to be the only agreement between the parties. The signed escrow instructions could meet the requirements of the statute of frauds and form the contract for sale. In fact, escrows frequently are opened without a prior buy-sell agreement. Escrow instructions often are prepared based on the oral instructions of the real estate agent.

Any changes in the escrow instructions (**amendments to the escrow instructions**) should be signed by both buyer and seller.

Escrow agents who violate their instructions are liable to their principals for losses suffered, but they are not liable if the principals do not suffer a loss (*Mains v. City Title Insurance Company* (1949) 34 C.2d 580).

Conflict between purchase agreements and escrow instructions Escrow instructions are actually independent of any purchase agreement between the parties. If a difference exists between the instructions and the purchase agreement, the escrow instructions generally will prevail because, signed at a later date, they more clearly show the final agreement of the parties. However, escrow instructions might state that the purchase contract will govern in the event of an ambiguity. In such a case, the purchase contract would prevail. If the escrow instructions and a later amendment by the parties are in conflict, the later amendment will govern.

Escrow Duties

Escrow duties might include

- ordering preliminary title reports;
- accepting structural pest control reports and other reports as required by escrow for delivery to the buyer;
- obtaining beneficiary statements on existing loans so balances can be ascertained, as well as the actual payoff amount (demand statement);
- accepting instructions for new loans and obtaining the buyer's signature to satisfy the lender;
- ascertaining amounts in impound accounts;
- arranging for the transfer of insurance;
- obtaining deeds of reconveyance;
- drafting grant deeds, trust deeds, notes, et cetera;
- preparing closing statements showing all receipts, expenditures, costs, and prorations;
- requesting necessary funds for closing;
- recording all documents, disbursing funds, and issuing closing statements; and
- reporting the sale to IRS on form 1099-S.

Escrow Agents

Designating the escrow holder The designation of the escrow holder is the responsibility of the buyer and the seller. Normally, the buyer designates the escrow holder in the offer; the seller, by the seller's acceptance, has agreed to the escrow.

Real estate brokers cannot nominate an escrow holder as a condition precedent to the transaction but may recommend an escrow holder to the parties.

Licensing Escrows must be licensed by the commissioner of corporations. Exempt from the licensing requirements of the escrow law are

- banks and savings associations;
- title insurance companies;
- attorneys (attorneys essentially are unregulated unless they operate an escrow company); however, they must have had a bona fide client relationship with one of the parties; and
- real estate brokers. (This exemption applies only to transactions where the broker was either a principal or the listing or selling agent.)

Individuals cannot be licensed as escrows. Escrows must be corporations. Applicants for escrow licenses must furnish a \$25,000 surety bond, and all directors, trustees, and employees of an escrow who have access to money or valuable securities must have a \$125,000 fidelity bond. All money deposited in escrow must be placed in a trust account that is exempt from execution or attachment for any claim against the escrow agent.

Prohibitions Licensed escrows are prohibited from

- paying referral fees to anyone except for the normal employee compensation;
- accepting escrow instructions or amendments containing any blanks to be filled in after the signing or initialing of the instructions;
- turning over buyer funds to the seller without buyer authorization or before the seller has conveyed title (some of the creative financing arrangements with extremely long escrows providing for funds to be turned over to the seller before the close of escrow can be dangerous because intervening liens could attach to the property); and
- permitting any party to unilaterally change or amend signed instructions.

Prohibitions on broker/escrow While a real estate broker can act as an escrow agent in transactions where the broker represented the buyer, represented the seller, or acted as a principal to the transaction, Section 2950 of the real estate commissioner's regulations prohibits the following acts by a broker/escrow. The following acts are considered to be grounds for disciplinary action:

- Soliciting or accepting an escrow instruction or amendment containing blanks to be filled in after signing or initialing
- Permitting any person to make an addition, a deletion, or an alteration to escrow instructions or amendments unless signed or initialed by all the parties to the escrow instructions
- Failing to provide a copy, at the time of signing, to people executing escrow instructions or amendments
- Failing to maintain books, records, and accounts in accordance with accepted principles of accounting and good business practice
- Failing to maintain all records relating to escrows freely accessible for audits, inspections, and examination by the commissioner
- Failing to deposit all money received, as an escrow agent and as part of an escrow transaction, in a bank trust account or an escrow account on or before the close of the next full working day after receipt thereof
- Withdrawing or paying out any money deposited in such trust account or escrow account without the written instructions of the party or parties paying the money into escrow
- Failing to advise all parties, in writing, that any licensee, acting as such in the transaction, has any interest in the escrow agency—stockholder, partner, officer, owner, et cetera (prohibits a broker from having any undisclosed interest in the escrow)
- Failing to provide a written closing statement to the principals showing all receipts and disbursements and to whom they were made

Section 2995 of the Civil Code prohibits a real estate developer from requiring, as a condition precedent for a sale of a single-family dwelling, that escrow be provided by an escrow entity in which the developer has a financial interest. (A financial interest is defined as 5% or more.) The penalty for a violation is the greater of \$250 or three times the escrow charge, plus attorney fees and costs. This provision cannot be waived by the purchaser.

The Division of Corporations has interpreted Section 17006(d) of the Financial Code (broker's exemption) as follows:

- The exemption is available only to the real estate broker.
- The exemption is personal to the broker and cannot be delegated to others (other than ministerial functions).
- In a purchase and sale agreement, the broker must be either a party to the transaction or the listing or selling broker.
- The exemption is not available for any association of brokers for the purpose of conducting escrows.
- The broker escrow function must only be an ancillary part of the broker's business.
- When the broker's escrow business is a substantial factor in the utilization of the broker's services, the broker may not delegate or contract out any services that may be provided pursuant to the exemption. (This apparently covers the ministerial functions.)

Brokers cannot advertise that they conduct escrows without specifying in the advertisement that such services are only in connection with the real estate brokerage business.

A broker may not use a fictitious name or a corporate name containing the word *escrow* or advertise in any other manner that would tend to be misleading to the public.

A broker who acts as an escrow agent must put aside any agency relationship with the buyer or the seller, as well as any special interests. The broker must maintain the position of a neutral depository, as would any other escrow agent.

Disclosure The escrow agent has a duty to both parties to keep the escrow matters confidential. There is some disagreement among the courts, however, as to an escrow agent's duty to warn the parties of possible fraud, or to advise them to take actions to protect their interests. At present, California cases indicate that generally an escrow holder need not warn a seller of exceptional risk or likely fraud. A broker acting as escrow agent still, however, has the duty to protect the parties through full disclosure of any detrimental fact or risk involved in the transaction.

CASE STUDY In *Lee v. Escrow Consultants, Inc.* (1989) 210 C.A.3d 915, an escrow paid out \$100,000 to a seller upon a forged amendment to the escrow instructions authorizing the release of the funds. The court held that the plaintiff had stated a valid cause of action and indicated the escrow agent had a duty to verify the signatures when the escrow instructions require amendments to be in writing.

CASE STUDY In *Christenson v. Commonwealth Land Title Insurance Company* (1983) 666 P.2d 302, a party to an escrow requested that the escrow agent provide information to a creditor. The escrow agent provided the wrong information, with the result that the creditor suffered a loss. The court held that while the escrow agent had no duty to supply information to third parties, after it did so, it had a duty of reasonable care. The escrow agent was therefore liable for the loss suffered by its negligence.

CASE STUDY In the case of *In re Marriage of Cloney* (2001) 91 C.A.4th 429, the court ruled that an escrow agent had a duty to disclose to its principal, First American Title, and the purchaser that the seller had used alternative names and that the agent's knowledge can be imputed to the principal. (First American Title failed to check records as to liens for other names used by the seller.)

The elder abuse law Welfare and Institutions Code Section 15610.30 (the **elder abuse law**) requires that escrow holders, realty agents, and others report elder financial abuse, fraud, or undue influence. The county public guardian is authorized to take control of the elder's assets to prevent such abuse. In the absence of this statute, escrows would not be required to warn of suspected fraud.

Possession and Risk of Loss

Unless agreed otherwise, the seller retains possession until the close of escrow. If property is destroyed or seriously damaged after a purchase contract is entered into, the **Uniform Vendor and Purchaser Risk Act** (Civil Code Section 1662) provides the following, unless otherwise agreed:

- If neither title or possession has passed to the purchaser and damage is without fault of the purchaser, then the purchaser is entitled to recover all monies paid.
- If either possession or title has been transferred to the purchaser and damage or destruction was without fault of the seller, then the purchaser is not relieved of contractual obligations. Any expenses incurred for the property are the seller's responsibility until the close of escrow. Rents and other income also accrue to the seller until the close of escrow. However, rents paid in advance normally are prorated at closing.

During the escrow period, the legal title remains with the seller, even though the escrow holder has the deed. The buyer has an equitable title when all monies and documents have been deposited into escrow.

The parties normally agree that title passes when the deed is recorded, or on a particular date. In the absence of such agreement, the title could pass when all conditions are met. The risk of loss, therefore, could be on a buyer before the buyer realizes title has transferred. The buyer's insurance usually will not take effect until the close of escrow, so a

buyer who takes possession or title before the close of escrow will need to obtain earlier insurance coverage.

Termination of Escrow

Full performance, by completion of the escrow, terminates the escrow. Escrows also can be terminated by the mutual agreement of both the buyer and the seller. In addition, impossibility of performance will terminate an escrow.

If only one party has signed the escrow instructions, that party can terminate the escrow before the other party's signing and forming a bilateral agreement. However, the person terminating the escrow still could be liable under the purchase contract.

Because escrows customarily provide for time being "of the essence," failure to complete an escrow on time will terminate the escrow. The parties then will have to agree to amend the escrow instructions if they want it to continue.

In practice, however, most escrow instructions provide that they will continue unless canceled by either party. Nevertheless, a person whose failure to perform was the reason for a delay cannot use the delay as the basis for terminating the escrow.

Court decisions have shown some inconsistency relating to "time is of the essence" clauses. Several courts have allowed a reasonable period beyond the date specified.

CASE STUDY In the case of *First National Bank of La Habra v. Caldwell* (1927) 84 C.A. 438, no time limit was placed on an escrow. The court held that, where no time is specified in an escrow, it must be performed within a reasonable period of time. A delay from June 7 to September 21 was considered an unreasonable delay and allowed the purchaser to rescind.

Unless the purchase contract is terminated along with an escrow, unilateral cancellation of escrow will not cancel the rights and obligations of the parties. Specific performance or damages still might be possible based on the purchase contract.

A breach of a material provision of an escrow by one party will allow the other party to cancel. A breach can be waived by the party it was intended to benefit.

If the escrow agent dies, the parties select a substitute agent. After escrow instructions have been signed, escrow will not be terminated by the death of either the buyer or the seller. The escrow, unless agreed otherwise, will be binding on the estate of the deceased principal.

Buyer's deposit When an escrow is terminated, the escrow agent ordinarily requests that the parties sign a termination or cancellation agreement that specifies how to dispose of funds being held. Returning funds to the buyer, or paying funds to the seller as liquidated damages, could subject the escrow holder to liability should the court later determine the action to have been improper.

For an escrow involving one to four residential units where the buyer indicated an intention to occupy a unit, Civil Code Section 1057.3 provides for a penalty for the wrongful refusal of a party to execute documents required by the escrow holder to release funds. The aggrieved party is entitled to

- the amount of the funds deposited in escrow,
- treble the amount of escrow funds (but not less than \$100 or more than \$1,000), and
- reasonable attorney fees.

When the buyer of one to four residential units indicates an intention to occupy a unit and then defaults, the liquidated damages cannot exceed 3% of the sales price.

If both buyer and seller claim a deposit when an escrow has terminated, the escrow agent should file an **interpleader action** asking the courts to determine who has valid claim to the funds held.

Money deposited by the buyer into escrow is given conditionally because it is to be paid to the seller only when title is transferred. The deposit ordinarily remains the property of the buyer until the closing, even though the buyer has given up control of the deposit.

The buyer generally assumes the risk of loss of the deposit through embezzlement by the escrow or bank failure. If, however, the loss results from a delay in closing caused by the seller's act or negligence, the seller bears the risk of loss.

If a buyer's deposit is a personal check rather than cash, a cashier's check, or a certified check, the escrow agent should wait until the check clears before conveying title. The escrow agent could be liable if the buyer's check fails to clear the bank.

Escrow charges and prorating Who pays for the escrow services is determined by agreement of the parties to the escrow (buyers and sellers). Normally, escrow charges are split between the parties. Title insurance costs are paid by the buyer or the seller according to their agreement. Taxes, insurance, interest, rents, et cetera, are prorated, with the seller usually responsible up to and including the day of closing and the buyer usually responsible after the date of closing. Proration is usually based on a 360-day year and a 30-day month. Parties may, however, make other payment or prorating agreements.

If no provision is made for who is to pay for escrow charges, title insurance, et cetera, local custom and usage generally prevail. Custom and usage among the counties in California vary. For example, in most areas of Southern California, the seller pays for the standard policy of title insurance, while in a number of northern areas, the buyer pays.

Doctrine of relation back Title does not pass until escrow conditions have been performed. Before title being passed, the property could acquire liens. If a lien is acquired during this period by a party who had knowledge or notice of the escrow or of the rights of the grantee, the buyer's rights relate back to the delivery of the deed to the escrow, to defeat these intervening liens.

If the grantor dies after the deed is given to escrow, the delivery date of the deed relates back to the date it was given to escrow. Because that date preceded the grantor's death,

there is no need for probate court approval. If the deed were not delivered to escrow, the grantee could bring an action for specific performance against the seller's heirs.

Because the **relation-back doctrine** is equitable, it does not apply to third parties who obtain interest without the knowledge of the escrow agent or of the grantee's interest.

Mobile home escrows When money is deposited into an escrow account involving the sale or lease of a mobile home and the escrow receives written notice from a party of a dispute, the escrow must inform the parties of their right to submit a written request that the escrow hold the funds pending resolution of the problem.

TITLE INSURANCE

An **abstract of title** is a history of title showing every recorded document. Lawyers give opinions of the marketability of titles based on the abstracts. This method is still used in some states.

The problem with **opinions of title** based on abstracts is that abstracts do not show hidden items, such as the contractual capacity of a grantor, a forged or altered document in the chain of title, an unknown spousal interest, failure of delivery, or unrecorded documents. The abstractor is liable only for negligence in failing to report a recorded document, and the attorney is liable only for failing to discover problems that were evident in the abstract.

The need for greater protection led to title insurance. In California, title insurance is used to prove marketable title. For a single premium, title insurance companies insure a purchaser as to the marketability of title. **Title insurance** is a contract to indemnify the insured against loss through defects in the title or against liens and encumbrances that may affect the title at the time the policy is issued.

CASE STUDY In the case of *Southwest Title Ins. Co. v. Northland Bldg. Corp.* (1976) 542 S.W.2d 436, the title policy failed to indicate that a first trust deed included a dragnet clause. (A dragnet clause allows for later advances that take priority as of the date the original trust deed was recorded.) A lender gave a second trust deed based on the seller's equity revealed by the title policy. Subsequent advances on the first trust deed took precedence over the second trust deed. The title insurance company was held liable for the loss suffered. The court held that the policy should have revealed not only the prior liens but also the existence of dragnet clauses.

While title insurance also covers the executor, administrator, and heirs of the insured, it does not directly cover other successors in interest. New buyers must obtain their own insurance protection.

CASE STUDY In the case of *Harrison v. Commonwealth Land Title Ins. Co.* (1979) 97 C.A.3d 973, at a sheriff's sale, the sheriff read from a title policy that had been issued to an attorney for the judgment creditor. The purchaser at the sheriff's sale discovered that the title policy failed to indicate a trust deed. The court held that the insurance company had no liability to the purchaser. The report was not issued to the purchaser as an insured, and the purchaser was held not justified in relying on it.

CASE STUDY In the case of *Kwok v. Transnation Title Insurance Co.* (2009) 170 C.A. 4th 1562, Patrick and Maria Kwok had formed the Mary Bell LLC to develop real estate. They built a single-family home. Because of a lengthy dispute with a neighbor about an easement, they decided to move into the house. They transferred title from the LLC to the Kwok Revocable Trust. Their title insurer refused to provide coverage for the easement problem, claiming the trust was not covered by the policy. The trial court held that the voluntary act of deeding property from the LLC to the trust terminated the coverage of the title policy.

The Court of Appeal affirmed, noting they could not rewrite the policy. The insured LLC no longer had an interest in the property.

Note: Changing the form of ownership could be costly.

Title insurance could, however, indirectly cover subsequent purchasers who successfully sue an insured grantor because of a title defect included in the grantor's coverage.

Title insurance offers indemnification against loss up to the amount of coverage purchased. Some policies have an inflation endorsement that provides increases in coverage. The title insurance company is obligated to defend the title in legal action, cure the defects, or pay for the loss up to the policy limits.

Before issuing a title insurance policy, the title company will search the records to determine if it will write a policy. Title insurance companies use a **title plant** that is a computer system showing every document that has been recorded within the county.

The title insurer has no actual duty to ascertain whether the title is good. Any records search it performs is for its own protection in deciding if it wants to take the risk of insuring title.

The California insurance commissioner regulates California title insurance companies.

For escrows in which no policy of title insurance is to be issued to the buyer, the following statement must be signed and acknowledged by all parties to the escrow:

Important: In a purchase or exchange of real property, it may be advisable to obtain title insurance in connection with the close of escrow because there may be prior recorded liens and encumbrances, which affect your interest in the property being acquired. A new policy of title insurance should be obtained in order to ensure your interest in the property you are acquiring.

Preliminary Title Report

After deciding that it will issue title insurance, the title company issues a **preliminary title report**, which indicates exceptions to its coverage. The preliminary title report is not insurance. A separate fee is charged for the title insurance policy, which is usually issued at close of escrow.

CASE STUDY The case of *Soifer v. Chicago Title* (2010) 187 C.A. 4th 365 involved a foreclosure buyer who customarily contacted Chicago Title before bidding to determine the priority of loans being foreclosed. The title company contacted the plaintiff via an email that a loan being foreclosed was a first trust deed when in fact it was a second trust deed. The plaintiff purchased the property based on the false information. The plaintiff suffered a loss of \$1 million.

The court held that a title insurer was not liable for the mistaken free information given to the plaintiff. He did not pay anything for it. There is no liability in the absence of a title policy.

Note: Had the priority of the loan been set forth in a preliminary title report and had Soifer purchased the title policy, he would have been protected.

According to Section 12340.11 of the Insurance Code, preliminary title reports are offers to issue a title policy subject to stated conditions. The reports are not abstracts, nor are there any rights, duties, or responsibilities applicable to the issuance of the preliminary report. The report will not be construed as, or constitute a representation of, the condition of title, but will constitute a statement of the terms and conditions on which the issuer is willing to issue its title policy, if such offer is accepted.

CASE STUDY *Southland Title Corporation v. Superior Court* (1991) 231 C.A.3d 530 involved a preliminary title report that did not mention a flood control easement. The court held that the title insurer is not liable for its negligence in preparing the preliminary title report. It held that the report was merely an offer to issue a title policy. The home purchasers were able to collect only up to the limits of their title insurance policy. (They had sought to collect beyond their policy limits based on the negligence of the insurance carrier.)

Homeowner Standard Policy Coverage (California Land Title Association—CLTA)

The homeowner **standard policy of title insurance** covers matters of record not specifically excluded from coverage, as well as matters not of record, such as

- forgery,
- lack of capacity of a grantor,

- undisclosed spousal interest (a grantor who claimed to have been single could have a spouse with community property interests),
- failure of delivery of a prior deed,
- federal estate tax liens,
- deeds of a corporation whose charter has expired, and
- deeds of an agent whose capacity has terminated.

Standard policy exclusions Not covered by a homeowner standard policy of title insurance are

- defects known by the insured and not disclosed to the title insurer;
- zoning (a special endorsement is available stating that property currently is zoned properly or that a current use is authorized by the zoning);
- mining claims (these are filed in mining districts, and legal descriptions are not required);
- taxes and assessments that are not yet liens;
- easements and liens not a matter of public record (such as mechanic's lien rights);
- rights of parties in possession (unrecorded deeds, options, leases, etc.) and matters that would be disclosed by making inquiry of people on the property;
- matters not of record that would be disclosed by checking the property (such as encroachment);
- matters that would be revealed by a correct survey;
- water rights; and
- reservations in government patents.

Homeowner Extended-Coverage Policies

Both the California Land Title Association (CLTA) and the American Land Title Association (ALTA) now offer extended coverage title policies for homeowners. Most California title insurers now issue extended policies to homebuyers similar to lender extended coverage unless the purchaser requests the CLTA standard policy, which offers less coverage at a slightly lower premium.

Lender Extended-Coverage Policy

Because many lenders are from other areas, the physical inspection necessary to protect their interests under a standard policy has not been feasible. Therefore, the **American Land Title Association (ALTA)** policy was developed to meet lender needs. Besides offering greater protection to the lenders, the **extended-coverage policy of title insurance** allowed assignment because loans frequently are transferred between lenders. The lender's policy provides coverage only until the loan is paid. It actually offers decreasing coverage each year.

CASE STUDY *Lick Mill Creek Apartments v. Chicago Title Co.* (1991) 231 C.A.3d 1654 involved a case where land with hazardous waste was purchased. The buyer sought reimbursement of removal costs from the title insurer. The court held that, while an ALTA title policy offers more complete off-record coverage than a CLTA policy, it does not cover physical defects, such as contamination. The court noted that encumbrances are defined (Civil Code Section 1114) as “taxes, assessments, and all liens upon real property.” An order to clean up property is not a lien unless recorded. (Marketability of title and market value are not the same thing.)

CASE STUDY In the case of *Walters v. Marler* (1978) 83 C.A.3d 1, a house was constructed on the wrong lot. While the lender had an extended-coverage policy of title insurance, the owner had only a standard policy. The court held that, while the lender was insured for the risk, the owner was not. The owner cannot benefit from the extended-coverage policy without having paid the additional premium.

In addition to the coverage offered by the standard policy, an ALTA extended-coverage policy of title insurance includes

- unrecorded liens;
- off-record easements;
- rights of parties in physical possession, including tenants and buyers under unrecorded instruments;
- rights and claims that a correct survey or physical inspection of the land would show;
- mining claims;
- reservations in patents;
- water rights; and
- lack of access.

Lender Extended-Coverage Exclusions

Extended-coverage policies do not cover

- matters known by the insured but not conveyed to the insurer,
- government regulations such as zoning,
- liens placed by the insured,
- eminent domain,
- violations of the map act, or
- the physical condition of the property.

Figure 14.2 simplifies title insurance coverage.

FIGURE 14.2: Owner's Title Insurance Policy

Standard Coverage	Lender Extended Coverage	Not Covered by Either Policy
1. Defects found in public records 2. Forged documents 3. Incompetent grantors 4. Incorrect marital statements 5. Improperly delivered deeds	Standard coverage plus defects discoverable through 1. property inspection, including unrecorded rights of people in possession; 2. examination of survey; and 3. unrecorded liens not known of by policyholder	1. Defects and liens listed in policy 2. Defects known to buyer 3. Changes in land use brought about by zoning ordinances

Special Policies

A number of special policies are available, including construction lender policies (with endorsements protecting against prior mechanics' liens), vendee policies for purchasers under real property sales contracts, leasehold loan policies, leasehold owners' policies, and oil and gas interest policies.

Endorsements can be obtained for special additional coverage, or exclusion from coverage.

Policy Interpretation

Title policies should be interpreted in accordance with the reasonable expectations of the insured. Any questions about ambiguities in a policy normally will be resolved against the insurer.

A new title insurance company in California must have at least \$500,000 paid-in capital and show a surplus of at least \$1,000,000.

Title Insurance Companies

Title insurance companies must set apart annually, as a title insurance surplus fund, a sum equal to 10% of premiums collected during the year until this fund equals the lesser of 25% of the paid-in capital of the company, or \$1 million. This fund offers further security to the holders and beneficiaries of title insurance policies.

Rebate law Title insurance companies in California must charge for services and make a sincere effort to collect such charges.

The **rebate law** extends the anticommission provisions of the Insurance Code to prohibit direct or indirect payments by a title insurer to principals in a transaction as a consideration for business. The rebate prohibition extends to any title business, including escrows.

It is a criminal offense for an employee of a title company or controlled escrow company to pay a commission (directly or indirectly) to a real estate licensee as an inducement for placement or referral of title business. The criminal penalties apply to both giving and receiving the kickback. The penalty is up to one year in jail and a fine up to \$10,000 for each offense (Penal Code 641.4).

The title insurance company may, however, furnish the names of owners of record and the legal description of parcels of real estate without charge.

The California Department of Insurance has indicated that providing a broker with a “Comparative Market Analysis” is a prohibited inducement.

SUMMARY

Escrows are neutral depositories that handle the functions of real estate closings. The escrow is not effective until both the buyer and the seller sign identical or conforming escrow instructions. The escrow agent represents the buyer and seller and must obey their instructions.

Generally, escrow instructions that are signed after the purchase agreement will prevail if an ambiguity between the two develops.

Escrow instructions would include the names of the parties, how title is to be taken, special terms, contingencies, and transfer instructions, as well as the payment of costs and charges.

The escrow agent handles all the paperwork of closing, such as drafting documents, obtaining signatures, paying off existing liens, dispersing funds, and issuing closing statements.

Escrows must be licensed by the commissioner of corporations, with the exception of banks and savings associations, title insurance companies, attorneys, and real estate brokers. Real estate brokers can serve as escrows on transactions in which they represented either the buyer or the seller, or were a principal. A real estate broker cannot delegate other than ministerial functions to others and cannot use the word “escrow” in the broker’s fictitious or corporate name.

An escrow will be terminated by

- full performance,
- mutual agreement of the parties,
- failure to fulfill a condition necessary for closing, or
- a breach of a material provision by one party (which allows the other party to cancel).

Title insurance protects purchasers and/or lenders by insuring the marketability of title. A title insurance company agrees to indemnify against losses that are not excluded, up to the amount of coverage purchased. Title insurance protects only the named insured and the insured’s estate or heirs.

A title insurer will issue a preliminary title report, which indicates that the insurer will insure with named exceptions. The preliminary title report provides no insurance protection if a policy of insurance is not issued.

A standard policy of title insurance (California Land Title Association—CLTA) covers matters of record, as well as matters not of record, including

- forgery,
- lack of capacity of a grantor,
- undisclosed spousal interest,
- failure of delivery of a prior deed,
- federal estate tax liens,
- deeds of a corporation whose charter has expired, and
- deeds of an agent whose capacity has terminated.

The need for greater protection for lenders who were not in an area led to the development of the American Land Title Association (ALTA) policy, which offers extended coverage to lenders. The same protection also can be obtained by buyers.

Extended coverage includes

- unrecorded liens,
- off-record easements,
- rights of parties in possession,
- rights and claims a correct survey would have revealed,
- reservations in patents,
- water rights, and
- lack of access.

Special title insurance policies are available for construction lenders, purchasers on real property sales contracts, lessees, leasehold lenders, oil and gas interests, et cetera.

Ambiguities in title policies generally are resolved against the insurance carrier.

Title insurers and escrows are prohibited from providing rebates to brokers for referral of business. This prohibition extends to special rates and not making a sincere effort to collect for services.

DISCUSSION CASES

1. An escrow delivered title to a buyer before conditions of the escrow were met. **What are the rights of the parties?**

Kish v. Bay Counties Title Guaranty Co. (1967) 254 C.A.2d 725

2. The sellers signed escrow instructions directing that the broker's commission be paid out of the sale proceeds. The sales agreement authorizing the commission was not deposited into escrow. On the day before closing, the seller instructed the escrow holder not to pay the commission. **In not paying the broker, was the escrow liable for the broker's loss?**

Contemporary Invs., Inc. v. Safeco Title Ins. Co. (1983) 145 C.A.3d 999

3. An escrow received a check unaccompanied by any instructions. (The purchaser had not signed the escrow instructions.) The check was for \$880 more than was required as an increased deposit in a transaction. The title company put the undeposited check in the file. The purchaser subsequently notified the seller that the transaction would not be completed. The seller's attorney demanded that the \$5,000 be turned over to the seller. The purchaser had emptied the account, so the check could not be cashed. **Was the escrow liable to the seller?**

Riando v. San Benito Title Guarantee Co. (1950) 35 C.2d 170

4. It was alleged that the escrow knew that the plaintiffs were being defrauded by others. **Does the escrow have a duty to warn the purchaser?**

Lee v. Title Insurance & Trust Co. (1968) 264 C.A.2d 160

5. An amendment to escrow instructions called for security to be a fourth trust deed rather than a second trust deed as originally called for. A prior lienholder subsequently foreclosed on the property. The plaintiff claimed that the escrow was negligent and breached a fiduciary duty in that it failed to call the substituted consideration specifically to the attention of the plaintiff. **Was the plaintiff's claim valid?**

Axley v. Transamerica Title Ins. Co. (1978) 88 C.A.3d 1

6. The plaintiff was to loan a property owner enough money to pay off an existing first trust deed and was to take back a new first trust deed as security. The plaintiff paid off the existing first trust deed outside of escrow. The escrow, contrary to oral instructions, recorded the deed of reconveyance. This allowed the owner to place another first trust deed on the property. **Is the escrow liable?**

Zang v. Northwestern Title Co. (1982) 135 C.A.3d 159

7. Warrington agreed to assume the mortgages of record. A preliminary title report issued to the seller in a different transaction failed to disclose a second mortgage. **Is the insurance company liable for its negligence?**

Warrington v. Transamerica Title Ins. Co. (1979) 546 P.2d 627

8. An insurance company failed to defend an attack on a title because it believed that the claim was not covered. **If the claim actually was covered by the policy, what would be the limits of the insurer's liability?**

Samson v. Transamerica Ins. Co. (1981) 30 C.3d 220

9. The buyers, the sellers, and the buyers' agent went to an escrow agent to draw up instructions on the sale of a chicken ranch. The escrow instructions included a bill of sale for all the equipment that turned all the fixtures into personal property and a trust deed for the ranch. The purchaser promptly removed all the equipment and defaulted on the purchase price. Because it was a purchase money trust deed, a deficiency judgment was not possible. **Was the escrow agent negligent?**

Cunningham v. Security Title Ins. Co. (1966) 241 C.A.2d 626

10. An escrow agent agreed to withhold funds to cover a debt due the plaintiff for material. The escrow agent failed to withhold the funds as agreed. The plaintiff was not a party to the escrow. **Is the escrow agent liable to the plaintiff?**

Warrington Lumber Co. v. Fullerton Mtg. & Escrow Co. (1963) 222 C.A.2d 706

11. A title insurer's policy had an exclusion for "water rights, claims, or title to water." The title insurance failed to discover a recorded easement given by the previous owner to a water company for drilling and running a pipeline. **Is the insurer liable?**

White v. Western Title Ins. Co. (1985) 40 C.3d 870

12. The buyer's deposit into escrow was a check that remained uncashed. The seller did not know that the check was not deposited. The buyer defaulted. **What, if anything, is the escrow agent's liability to the seller?**

Wade v. Lake County Title Co. (1970) 6 C.A.3d 824

UNIT QUIZ

1. After escrow instructions have been signed, the escrow agent may
 - a. fill in blanks left by the parties.
 - b. return the deposit to the buyer if the escrow fails to close on time.
 - c. refuse to obey instructions received from the broker.
 - d. do none of these.
2. If escrow instructions fail to provide for the date of possession, possession will be given
 - a. within 30 days of close of escrow.
 - b. within a reasonable time.
 - c. at close of escrow.
 - d. before close of escrow.
3. An amendment to the escrow instructions requires the agreement of
 - a. the buyer and the escrow.
 - b. the agent and the escrow.
 - c. the buyer, seller, agent, and escrow.
 - d. none of these.
4. When the signed escrow instructions differ from the purchase agreement,
 - a. the escrow takes precedence.
 - b. the purchase agreement takes precedence.
 - c. the contract becomes void for lack of certainty.
 - d. the escrow is required to commence an interpleader action.
5. Duties of an escrow do *NOT* include
 - a. ordering preliminary title reports.
 - b. mediating buyer-seller disputes.
 - c. drafting deeds.
 - d. issuing closing statements.
6. Exempt from the licensing requirements are escrows conducted by
 - a. a real estate broker in transactions in which the broker represents either the buyer or the seller.
 - b. title insurance companies.
 - c. banks.
 - d. all of these parties.

7. A real estate broker, not licensed as an escrow, can conduct an escrow when the broker is
 - a. a representative of the seller.
 - b. a representative of the buyer.
 - c. a principal to the transaction.
 - d. any of these.
8. Which actions of an escrow would be improper?
 - a. Accepting fees from both buyer and seller
 - b. Refusing to pay a commission for referral to the escrow
 - c. Refusing to handle an escrow
 - d. Accepting escrow instructions with blanks to be filled in by the escrow after the instructions are signed
9. Which behavior is proper for a broker who, while not licensed as an escrow, conducts escrows on the broker's sales?
 - a. Delegating the escrow function to another
 - b. Using the name Jones Realty and Escrow Company'
 - c. Charging for the escrow services
 - d. None of these
10. A buyer given possession by the seller one week before close of escrow should be **MOST** concerned about
 - a. the impound account.
 - b. risk of loss.
 - c. extended title coverage.
 - d. designation of the escrow holder.
11. Which statement is *TRUE* of the rights and obligations during escrow?
 - a. The seller retains risk of property loss.
 - b. Rents belong to the seller.
 - c. Property expenses are the responsibility of the seller.
 - d. All of these are true.
12. Which would **NOT** terminate an escrow?
 - a. Full performance of escrow duties
 - b. Mutual agreement of the parties
 - c. The broker's order to terminate
 - d. Impossibility of performance

13. When both buyer and seller make demands on escrow for the buyer's deposit after the escrow failed to close, the escrow holder should
 - a. deduct its fees and return the deposit to the person who made it.
 - b. deduct its fees and return the deposit to the seller.
 - c. file an interpleader action.
 - d. give the deposit to the first party making a claim to it.
14. Which *BEST* describes an abstract of title?
 - a. The complete legal description
 - b. An abbreviated description, such as a street address
 - c. A recorded history of title
 - d. An opinion of title
15. Which is *TRUE* regarding title insurance?
 - a. Executors and heirs are protected by the title insurance of the deceased insured.
 - b. A buyer obtains greater title protection if the lender is issued an extended-coverage policy.
 - c. Both of these are true.
 - d. Neither of these is true.
16. A title insurer will *NOT* be liable for a loss if
 - a. its negligence was not the cause of the loss.
 - b. the person suffering the loss was not the insured or the insured's estate or heirs.
 - c. either of these occurred.
 - d. neither of these occurred.
17. To issue a standard title policy, the insurer must
 - a. provide a survey.
 - b. determine whether title is good.
 - c. provide an abstract.
 - d. do none of these.
18. Which is *TRUE* of the preliminary title report?
 - a. It provides interim coverage.
 - b. It shows the condition of title.
 - c. It provides no insurance.
 - d. Both b and c are true.

19. A standard policy of title insurance protects against
 - a. rights of parties in possession.
 - b. unrecorded easements.
 - c. zoning restrictions.
 - d. forgery in the chain of title.
20. A standard policy of title insurance does *NOT* cover
 - a. unknown spousal interests.
 - b. rights of parties in possession.
 - c. forgery.
 - d. lack of capacity of the grantor.
21. A standard policy of title insurance covers
 - a. unrecorded mechanics' liens.
 - b. instruments outside the chain of title.
 - c. easements that are not a matter of public record.
 - d. none of these.
22. After buying a home and receiving a standard policy of title insurance, you determine that the "tenant" claims to be an owner under an unrecorded grant deed. Which statement is *TRUE*?
 - a. You are protected by your insurance.
 - b. If you record first, you will be protected.
 - c. You are not insured for this loss.
 - d. An abstract would have given you greater protection.
23. Extended-coverage homeowners title insurance adds which element to the coverage of the standard policy?
 - a. Forgery
 - b. Unknown spousal interests
 - c. Lack of capacity
 - d. Water rights
24. Extended-coverage policies of title insurance do *NOT* generally cover
 - a. claims of a party in possession.
 - b. building and zoning regulations.
 - c. prescriptive easements.
 - d. water rights.

25. The rebate law prohibits
- a. escrows from giving rebates to brokers.
 - b. title companies from giving rebates to brokers.
 - c. brokers from rebating commissions to buyers.
 - d. both a and b.

15

UNIT FIFTEEN



LANDLORD-TENANT LAW

KEY TERMS

assignment
constructive eviction
Costa-Hawkins Rental
Housing Act
demise
Ellis Act
exculpatory clauses
habitability
implied warranty

lease
nondisturbance clause
periodic tenancy
quiet enjoyment
rent control
retaliatory evictions
security deposit
sublease
surrender

tenancy at sufferance
tenancy at will
tenancy for years
30-day notice
three-day notice
unlawful detainer action
writ of possession

TYPES OF TENANCIES

A leasehold interest is a nonfreehold estate in real property. It is an interest where an owner gives the right to occupy or use property for a period of time. A transfer of a leasehold is known as a **demise**.

Tenancy for Years

A **tenancy for years**, or estate for years, is a leasehold interest with a definite termination date. The tenancy does not renew itself, and no notice is required to end it. A tenancy for years could be a rental of a summer cabin for a weekend or a multiyear lease.

Agricultural land in California cannot be leased for more than 51 years. Other property leases and mineral leases cannot exceed 99 years. (Mineral leases differ from mineral rights, which are grants or reservations of a fee interest and can go on forever.) Leases that provide for renewal options that could exceed statutory limits are unenforceable.

Periodic Tenancy

A **periodic tenancy** renews itself automatically from period to period unless notice of termination is given. Customarily, the period would be the rent-paying period, and the most common periodic tenancy is a month-to-month tenancy.

Either the lessor (landlord) or the lessee (tenant) can give notice to terminate. Notice of up to the length of the rent-paying period is generally required to terminate, but for month-to-month tenancies, it is usually 30 or 60 days. The parties to a periodic tenancy can agree to a notice period of less than 30 days, but notice always must be given at least 7 days before termination. If the tenant has lived in the property at least 12 months, then the landlord must give a 60-day notice to terminate. If a tenant is under a rental agreement with a government agency, such as Section 8 Housing, then a 90-day notice is required.

In California, the notice to terminate does not have to coincide with the rent-paying period. For example, on a month-to-month tenancy that ends on the first of the month, notice could be given to end the tenancy on the tenth of a month if the notice were given at least 30 days before the termination (**30-day notice**).

Rent increases and changes in the terms of a periodic tenancy also require notice for the length of the rent-paying period, but generally, notice need not be given more than 30 days in advance. However, if a rent increase is greater than a 10% increase over rent charged within the prior 12 months, then a 60-day notice of the rent increase is required.

In the absence of any agreement, housing units and nonresidential properties are presumed to be rented on a month-to-month basis when no local custom to the contrary exists. However, agricultural rentals are presumed to be for one year unless another period was indicated.

Tenancy at Will

A **tenancy at will** is held at the pleasure of the lessor for an unspecified period. Under a tenancy at will, there is possession without an agreement on the rent payment. If rent was paid or rent was agreed on, the tenancy would convert to a periodic tenancy. An example of a tenancy at will might be a tenant given possession while a lease was still being negotiated, before any agreement on rent has been reached. Under common law, no notice was required to terminate a tenancy at will, and it could be terminated by the lessor or lessee. Because California requires a notice by statute, California does not have a true tenancy at will.

Tenancy at Sufferance

In a **tenancy at sufferance** the lessee is a holdover tenant. For example, one who retains possession beyond the expiration of a tenancy for years, or a homeseller who fails to vacate by the agreed move-out date, is a holdover tenant.

California regards a tenant at sufferance as a trespasser rather than a tenant and considers an ejectment action or an unlawful detainer action (discussed later in this unit) to oust the trespasser a proper remedy.

When a lessor consents to the holdover or accepts rent from the tenant at sufferance, a periodic tenancy, which would require statutory notice to terminate, results.

THE LEASE

A **lease** is an agreement that transfers a right of exclusive possession for a stated term from a landlord (lessor) to a tenant (lessee). The lessor under the lease subordinates his rights of occupancy to the rights of the tenant. The lessor retains a reversionary interest; the lessor is entitled to possession when the tenancy has ended.

Leasehold interests are considered personal property (chattels real) rather than real property. The laws of personal property, therefore, apply.

Because a lease is a contract, all the requirements of a valid contract are required for a valid lease.

Leases can be oral or written agreements. However, an oral lease is enforceable only if it can be fully performed within one year of being agreed on. For example, a one-year oral lease beginning on the date of agreement is enforceable, but a one-year lease starting one month after the agreement must be in writing to be enforceable.

Leases may be recorded, but recordation is not necessary between the parties. Recording does give constructive notice of a tenant's interest, and this could be important in defining priority of interests when there is a subsequent trust deed or purchaser. A subsequent purchaser is not required to honor a lease for more than one year unless a memorandum of the lease is recorded, or the purchaser has constructive notice. Possession is deemed constructive notice, so a tenant's rights could be challenged by a subsequent purchaser only if the tenant had vacated or had not yet occupied the premises at the time of transfer and also had failed to record the lease.

To be recorded, a lease must be acknowledged by the lessor.

Form and Provisions of a Lease

No particular language is required to create a tenancy as long as the intent is clear. However, the language must include the names of the parties and clearly describe the premises, the amount of rent, and the term of the lease.

Commercial leases can be complex documents of dozens of pages, while residential leases are normally simpler contracts, as is the lease in Unit 6.

If the lease is in writing, the lessor must sign the lease. A tenant who moves in or pays rent after receiving a copy of the lease will be viewed as having accepted the lease even when the tenant has not signed it.

If jointly owned property is leased by a married couple for more than one year, both spouses must sign the lease.

Unless use is restricted by the lease, the tenant can use the premises for any lawful purpose.

In the absence of any agreement or practice to the contrary, for leases of one year or less, rent is due at the end of each rent-paying period. The parties to a lease generally agree, however, that rent will be paid in advance.

A residential landlord can prohibit the smoking of tobacco products in the premises if stated in the lease. For existing tenants, a notice of change of terms of tenancy must be given.

Lease provisions that call for forfeiture of the premises upon some default must be stated clearly. The courts generally will construe agreements to avoid forfeiture if the result will be inequitable. For forfeiture, a demand must be made for performance unless such demand would be futile. Failure to pay rent does not justify forfeiture.

If a tenant breaches a provision of the lease that calls for forfeiture and the landlord accepts rent knowing of the breach, the landlord could be said to have waived the right to declare forfeiture. This would not be the case if the lease specifies that acceptance of rent will not waive the landlord's rights to declare a forfeiture in the event of a continuing or subsequent breach.

Civil Code Section 1670.5, which prohibits the enforcement of unconscionable contracts, also applies to leases. Clauses that are so harsh as to be considered unconscionable will not be enforced by the courts. For example, courts will not enforce acceleration clauses in leases where the entire rent for the term of the lease becomes due if the lessee fails to make a payment by a specified date.

Leases often provide that they are renewed automatically if either party fails to give notice. An automatic renewal under such a lease would be voidable by the lessee if the lessee did not prepare the lease, and the automatic renewal clause was not printed in at least eight-point type and a reference to the automatic renewal was not placed in at least eight-point type just above where the lessee signs.

Notices and Management

The owner or agent of every multiunit dwelling of more than two units must disclose and keep current the name and address of each person authorized to manage the premises and to receive notices and demands on behalf of the owner.

Every residential property containing 16 or more units must have a resident manager.

Fair Housing

A landlord cannot discriminate based on a rental applicant's source of income, such as government subsidies, or because the applicant is in military service. All the federal and state fair housing acts apply to discrimination in rentals. For a detailed discussion of these rights, see Unit 4.

Fixtures

The lease may provide the tenant with rights to remove improvements. In the absence of such an agreement, fixtures stay with the property.

Because forfeiture is a harsh penalty, courts often will find tenant improvements to be personal property when they clearly would be justified in declaring the items fixtures. When there is doubt about whether an improvement can be defined as a fixture, courts generally will find in favor of the tenant.

As mentioned in Unit 7, tenants have the right to remove the annual crops that are the fruit of their labor, even after the tenancy has ended.

Trade fixtures Trade fixtures, also discussed in Unit 7, generally must be removed before the expiration of the lease. In the case of a month-to-month lease, the courts usually allow a reasonable period for removal of the fixtures; this period could extend beyond the termination date.

Tenant Improvements

The lessor should record and file a notice of nonresponsibility to be protected from mechanics' liens when a tenant makes improvements or repairs. If the lease obligates the tenant to make alterations, improvements, or repairs, a lien could be placed against the property even when the notice of nonresponsibility was filed. The tenant may become an agent of the owner in authorizing the work required by the lessor.

Options

Leases frequently contain options to purchase or options to renew. Part of the rent is generally regarded as consideration for the option. Ordinarily, time is considered to be of the essence for options; that is, they must be exercised within the period provided.

Exculpatory Clauses

Leases frequently contain **exculpatory clauses**, which purport to relieve the landlord of all liability for injury to the tenant and others as well as damage to the tenant's property. Despite the language of these clauses, a lease cannot excuse the landlord for acts, fraud, or violations of the law that are either willful or negligent. The tenant cannot waive the landlord's duty. Civil Code Section 1953 declares that exculpatory clauses in residential leases executed after January 1, 1976, are invalid.

CASE STUDY The case of *Burnett v. Chimney Sweep, LLC* (2004) 123 C.A.4th 1057 involved a commercial lease that included an exculpatory clause, which stated, "Notwithstanding lessor's negligence or breach of this lease, lessor shall under no circumstance be liable for injury to lessee's business or for any loss of income or profit therefrom."

The complaint alleged excessive moisture and the growth of mildew and mold on the leased premises. The defendant was notified of the problems and allegedly refused to remediate them. The tenant was unable to conduct business on the premises and sued for damages. The Santa Barbara Superior Court granted judgment to the landlord on the pleadings (a demurrer) based on the exculpatory clause, and awarded \$101,600 attorney fees to the owner and \$38,020 attorney fees to the property management firm.

The Court of Appeal reversed, ruling that the exculpatory clause only shielded the landlord from passive negligence, not from active negligence. Chimney Sweep was allegedly actively negligent in refusing to remediate the problem caused by excessive moisture and mold infestation.

Note: This decision shows the disdain courts hold for exculpatory clauses in which landlords attempt to avoid all liability for causes that are under their control.

Security Deposits

A **security deposit** is any payment, fee, deposit, or charge (not limited to the advance payment of rent) required by the lessor to secure the performance of a rental agreement. The maximum allowable security deposit for unfurnished units is two months' rent. For furnished units, it cannot exceed three months' rent (Civil Code Section 1950.5(c)).

Security deposits for service members are limited to one month's rent for unfurnished and two months' rent for furnished.

The lessor may appropriate necessary amounts from the deposit to remedy rent default, to repair damage done by the tenant, or to clean the premises upon termination of the tenancy if the deposit was made for those purposes (Civil Code Section 1950.5(e)).

The landlord must notify a tenant in writing of the tenant's right to request and be present at a prevacancy inspection of the tenant's rental unit. The purpose is to allow the tenant to correct any deficiencies so that the landlord does not deduct the correction costs from the tenant's security deposit. The tenant's right to a prevacancy inspection does not apply where the tenant is evicted for failure to pay rent or for violating conditions of the lease.

Security deposits do not apply to normal wear and tear. They apply to negligence and failure to maintain the premises in a reasonable manner.

No later than three weeks (21 days) after the tenant has vacated the premises, the landlord must furnish the tenant with an itemized written statement of the basis for, and the amount of, any security deposit retained, as well as the disposition of such security, and must return any remaining portion of such security (Civil Code Section 1950.5(e)). If documentation is not provided as to actual costs incurred by the landlord to repair or clean the rental unit, the landlord may not retain any portion of the deposit. The landlord need not provide this documentation if the deductions are \$125 or less.

When the landlord transfers the property, the security deposit must be either transferred to the new owner with notice given to the tenant, or returned to the tenant. In either case, the landlord can deduct sums due for rent, repairs, or cleaning. If the security deposits are not transferred to the new owner, the new owner and the former owner are jointly liable for the repayment of security deposits to the tenants (Civil Code Section 1950.5(i)).

An amendment to Civil Code Section 1950.5 makes the landlord liable for interest on unreturned security deposits at 2% per month. Any successor in interest of the landlord also will be liable.

The bad-faith retention by the landlord (or transferee in interest) of any portion of the deposit may subject the landlord to twice the amount of the security deposit plus actual damages to \$600 in damages in addition to actual damages (Civil Code Section 1950.5(j)).

The tenant's right to the return of the security deposit is a priority claim above those of any creditor of the landlord other than a trustee in bankruptcy.

In the absence of any agreement to pay interest or a local statute requiring interest, a landlord need not pay interest on security deposits. (Berkeley and San Francisco had ordinances requiring such interest.)

CASE STUDY The case of *Korens v. Zukin Corp.* (1989) 212 C.A.3d 1054 was a \$1.5 million class-action suit for interest on security deposits. In dismissing the lawsuit, the court pointed out there was no state law requiring landlords to pay interest on security deposits. "Any requirement that interest be paid should be enacted explicitly by the legislature, not developed through doctrinal manipulation by the courts."

If a lessor takes a security deposit in the form of the last month's rent, it is taxable to the lessor as regular income in the year received. If, however, the deposit is intended strictly to secure the payment of rent, cleaning costs, and possible damages, the deposit will be taxable only if and when it is forfeited.

CASE STUDY In the case of *People v. Parkmerced Co.* (1988) 198 C.A.3d 683, the district attorney sued the owner and management company of a 3,400-unit apartment complex. Tenants were charged \$65 more for the first month's rent on a one-year lease than for the other 11 months and were also charged a \$50 transfer fee if they wished to change apartments.

The Court of Appeal affirmed the trial court's decision that these fees were security deposits within the meaning of Civil Code Section 1950.5. Because the fees were not intended to cover repairs or tenant defaults, the defendants were not allowed to keep them. Defendants were ordered to reimburse past tenants for fees charged, notify current tenants of their right to receive a refund, and pay \$222,000 in civil penalties and \$40,000 in attorney fees.

A landlord can require a nonrefundable applicant screening fee for tenants (up to \$55.58 for December 2021; the fee is adjusted annually). Upon request, the landlord must supply the rental applicant a copy of a credit report paid for by the applicant (Civil Code 1950.6).

Civil Code Section 1950.7 sets forth rights and obligations as to security deposits for commercial tenancies.

ASSIGNMENTS AND SUBLEASES

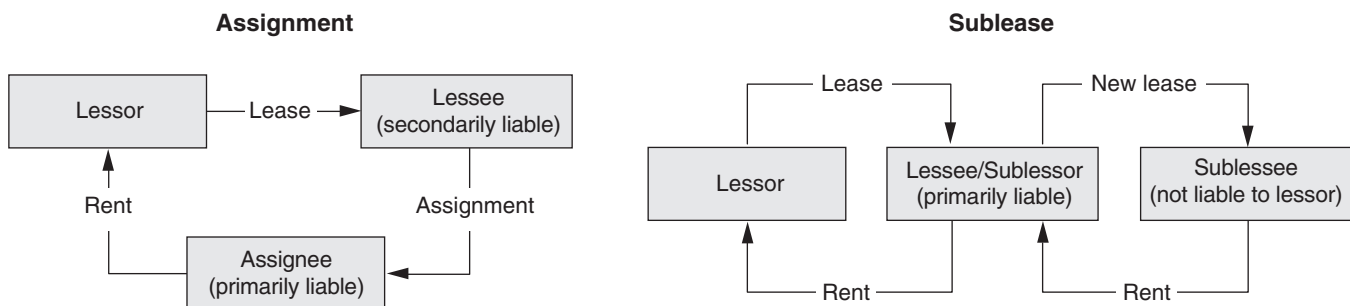
An **assignment** of a lease transfers the entire leasehold interest. The assignee becomes the tenant of the original lessor. The assignee is primarily liable on the lease, while the assignor retains secondary liability. (The assignor remains as a surety on the lease.)

Instead of assigning, the lessee would be better off surrendering the premises to the lessor and letting the assignee become a tenant on a new lease. If the lessor agrees to this, the original lessee will be free from any liability on the lease.

In a **sublease**, the lessee becomes a lessor (sublessor), and the sublessee is the tenant of the original lessee, not the tenant of the original lessor.

Figure 15.1 illustrates the differences between an assignment and a sublease.

FIGURE 15.1: Assignment vs. Subletting



Under a sublease, the lessee remains primarily liable on the lease. A sublease can be for the same term or less than the term of the original lease, and can be for all or part of the leased premises.

No privity of contract between the sublessee and the lessor exists. If the original lessee is evicted or the lease otherwise terminates, the rights of the sublessee also terminate.

The sublessee cannot have any greater rights than the original lessee had, because the sublessee's rights were granted by the sublessor.

Besides the ability to sublet only part of the premises, an important advantage of subleasing is that a rent differential is possible.

An option to purchase in a lease would go with an assignment, or it even can be separated from the lease unless the transfer of the option is prohibited by its terms. An option to purchase does not go with a sublease.

If a lease fails to restrict assignment or subleases, the lessee can freely transfer the lease interest. A lease may prohibit transfer of a tenant's rights (Civil Code Section 1995.230), but if transfer is allowed with the lessor's consent, consent cannot be refused unreasonably. The lease can require that the landlord share in some or all of the profits from an assignment or sublease (Civil Code Sections 1995.240 and 1995.250).

See *Kendall v. Ernest Pestana Inc.* (1985) 40 C.3d 488 and *Pay 'N' Pak Stores v. Superior Court* (1989) 210 C.A.3d 1404.

An assignment or sublease made when prohibited by the lease may be voidable, but is not void. A lessor who accepts rent after having knowledge of the assignment or sublease, however, has consented to it.

TERMINATION OF LEASES

A lease can be terminated by or for the following reasons:

- Destruction of the premises—some leases, however, provide that the rent is merely tolled (temporarily suspended) and the landlord has a stated period of time to rebuild.
- Action of a public body (eminent domain)—the tenant is released if the entire property is taken, but in cases of partial condemnation, where the portion remaining continues to meet the needs of the lessee, the lessee could be required to continue to pay rent (or a reduced rent). For example, the taking of several feet to widen a road probably would not allow the tenant to terminate the lease. A tenant could have a claim of loss against the public body for condemnation. In some cases, commercial tenants have received as much compensation in condemnation cases as the owners of the structures.
- Commercial frustration—this applies to unforeseen events, the nonoccurrence of which was a condition precedent of the contract (see Unit 5).
- Merger—where the same party acquires the lessee's and the lessor's interests, the lessor interest is lost by merger. For example, when a tenant under a long-term lease purchases the premises from a landlord and later sells the property, the former tenant will have lost the rights under the lease. When the tenant purchased the property, the tenant became the owner and no longer was a tenant.
- Bankruptcy of the tenant—the bankruptcy court could, however, determine that the lease was an asset of the bankrupt and assign it to another.
- Expiration or notice—estates for years terminate automatically by their terms. Notice ends a periodic tenancy.
- Foreclosure—the foreclosure of a trust deed recorded before the lease terminates the lease. (The cancellation is not automatic, because the new owner can elect to accept the existing lease.) A tenant who is entering a lease that requires a great

expenditure of labor and/or capital on the premises should consider obtaining the agreement of any prior trust deed beneficiary to recognize the lease in the event of foreclosure (**nondisturbance clause**).

- Failure to pay rent.
- Failure to give possession.
- Violation of any material condition of the lease.
- Use of the premises for an illegal or unauthorized purpose.
- Abandonment of the premises by the lessee.
- Surrender of the premises by the lessee (accepted by the lessor).
- The landlord's violation of the implied warranties of quiet enjoyment and habitability.
- The landlord's failure to make needed or agreed-on repairs.
- Domestic violence, sexual assault, human trafficking, elder abuse, or stalking.
- The tenant, or a member of the tenant's family, was the victim of a violent crime on the premises.

In these cases, the tenant is responsible for a maximum of 14 days' rent after notice is given. In the absence of an agreement to the contrary, the death of neither the lessor nor the lessee will terminate a lease.

A landlord cannot evict based on the tenant's immigration status. Similarly, the DRE cannot inquire as to a licensee's citizenship.

RIGHTS AND RESPONSIBILITIES OF LANDLORDS

Landlord Disclosures

Residential landlords are required to make the following disclosures to rental applicants:

- If the owner has received a notice of default and there is a pending foreclosure
- The presence of known lead-based paint
- Pesticides that were used
- Existence of registered sexual offender database (Megan's Law)
- Asbestos discovered on premises
- Methamphetamine contamination
- Reasonable notice of pesticide use in the unit or common areas
- Application for demolition permit
- That property is within one mile of a military base where explosives were stored
- If a unit is in a condominium conversion project
- Whether the property is located in a flood hazard area or area of potential flooding as well as the fact that hazard information is available from the Office of Emergency Services (The tenant should be advised to consider insuring possessions.)

- A bed bug notice that includes bed bug identification and procedures for reporting
- Tenant's right to reclaim personal property left on premises
- Documentation as to any known mold
- If the property is in a flood zone and if there is flood insurance

Right of Entry

In the absence of any agreement, the landlord can enter leased premises only when

- an emergency requires entry;
- the tenant consents to an entry;
- the entry is during normal business hours after reasonable notice (24 hours is considered reasonable) to make necessary or agreed repairs, alterations, or improvements, or to show the premises to prospective or actual purchasers, mortgagees, tenants, workers, or contractors, and the notice must specify date and approximate time as well as purpose of entry (Civil Code Section 1954);
- the tenant has abandoned or surrendered the premises; or
- the landlord has obtained a court order to enter.

Tenants cannot waive or modify their rights to privacy (Civil Code Section 1953).

If a tenant complains about bedbugs, the landlord cannot evict for 180 days.

CASE STUDY In the case of *Dromy v. Lukovsky* (2013) 219 C.A.4th 278, a landlord listed a tenant-occupied condominium for sale. The tenant refused to allow open houses on weekends. Civil Code Section 1054(b) allows entry to show prospective purchasers during “normal business hours.” The listing agent brought an action for declaratory relief to be able to conduct weekend open houses. The court ruled in the agent's favor with the following guidelines: only two open houses each month, 10-days' notice of open houses, specific hours for open houses, and a requirement that the agent be present at all open houses.

The Court of Appeal upheld the Superior Court.

Note: In this case, it was noted that in real estate, weekends are “normal business hours” for open houses. The court considered the interests of both parties to allow reasonable open houses on rental property.

Habitability

A residential lease has an **implied warranty of habitability**. The landlord must put a building intended for human habitation in a condition fit for occupancy and repair subsequent dilapidation. The landlord does not have this duty when the problem relates to a tenant's cleanliness, willful damage, or use in a manner other than intended. Under English common law, the landlord had no responsibility for any repairs, and the tenant had a duty to make only minor repairs.

The landlord must ensure at least that

- the plumbing is in proper working order;
- hot and cold water supply will be maintained;
- the heat, lights, and wiring work and are safe;
- the floors, stairways, and railings are in good condition;
- when rented, the premises are clean, with no pests;
- areas under lessor control will be maintained;
- the roof does not leak and no doors or windows are broken; and
- adequate garbage receptacles must be supplied.

Effective in 2014, all pre-1994 residential and commercial property, as a condition for building permits or certificate of completion for alterations or improvements, must replace noncompliance plumbing fixtures with water conservancy fixtures. Issuance of a building permit also triggers an owner's responsibility to update smoke alarms.

The landlord is required to notify residential tenants in advance of pest control treatment, including repeat treatment.

Tenants cannot waive their rights under the landlord's implied warranty of habitability; however, the landlord and the tenant can agree that the tenant will make the required repairs based on a rent reduction.

A landlord who demands or collects rent for an untenable dwelling as defined in Civil Code Section 1942.4 is liable for actual damages sustained by the tenant and special damages of not less than \$100 or more than \$5,000. The special damages also apply to landlords who raise rent or issue a three-day notice to quit or pay rent when the premises are untenable.

Landlords of substandard uninhabitable properties can be required to pay relocation costs for displaced tenants.

Civil Code Section 1174.2 provides that where a tenant prevails in an unlawful detainer action due to the landlord's breach of the warranty of habitability, the court will set the rent. The tenant must pay the rent set by the court within five days. The Code of Civil Procedure Section 1174.21 provides that a landlord is liable for tenant costs and attorney fees when the landlord initiated an unlawful detainer action for nonpayment of rent when the premises are not tenantable.

CASE STUDY In the case of *Hyatt v. Tedesco* (2002) 96 C.A.4th Supp. 62, a tenant raised the affirmative defense of habitability to an unlawful detainer action. The superior court appellate division in reversing the trial court held that the trial court is required to determine if a substantial breach has occurred. (Substantial breach is a failure of the landlord to comply with applicable building and housing standards that materially affect health and safety.) If so, the trial court should reduce the rent to reflect the breach, give the tenant right to possession conditioned upon paying the reduced rent, order the rent reduced until repairs are made, and award costs and attorney fees to the tenant. The landlord can also be ordered to make the repairs.

CASE STUDY In the case of *Espinoza v. Calva* (2008) 169 C.A. 4th 1393, a tenant defended an unlawful detainer action, claiming uninhabitability and the fact that the rental was an illegal unit.

The court held that the landlord could not collect for the back rent. The landlord failed to obtain a certificate of occupancy for the unit. Therefore, the lease was an illegal contract and unenforceable. The landlord could, however, obtain possession.

CASE STUDY The case of *City and County of San Francisco v. Sainez* (2000) 77 C.A.4th 1302 involved landlords who failed to maintain their premises. Building inspection found no or inadequate heat; deterioration of walls, ceilings, and windows; lack of fire extinguishers; hazardous wiring; hazardous plumbing; lack of smoke detectors, etc. The superior court imposed fines of \$767,000.

The Court of Appeal ruled the fines were proper but reduced them to \$663,000 because of a miscalculation. The Court of Appeal ruled that fines were not excessive because the landlords own at least 12 properties with net equity of \$2,300,000. While the landlords had the ability to do so, they had refused to bring the building up to a safe standard.

Note: This case shows court frustration with landlords who refuse to correct serious health and safety problems.

Municipalities are prohibited from requiring landlords to disclose, report, or take eviction action based on a tenant's (or prospective tenant's) citizenship status.

Liability for Injuries

If a landlord is negligent and that negligence results in injury to another, the landlord is liable for those resulting injuries. If defects at the time of leasing could have been discovered by a reasonable inspection, then the failure to cure the defect would be negligence.

If a dangerous condition occurs after leasing and the landlord has a duty to repair, then failure to repair after notice of the problem could subject the landlord to liability for injury.

For a period of time, California courts were following a rule of strict liability, holding landlords liable for injuries to others, even when there was no negligence by the owner. The following case illustrates the present view as to landlord liability; now proof of negligence is required.

CASE STUDY The case of *Peterson v. Superior Court* (1995) 10 C.4th 1185 involved a hotel that was sued by a guest for an injury caused by a slippery bathtub. The court pointed out that because the innkeeper did not build the structure or its components, strict liability should not be imposed without proof of negligence. The court decided it was in error when it previously held landlords strictly liable in tort for personal injuries caused by defective components. The court pointed out that landlords still are liable under general tort principles for injuries caused by defects in their premises if the landlord is negligent.

CASE STUDY The case of *Penner v. Falk* (1984) 153 C.A.3d 858 indicated that punitive damages would be proper if the landlord knew of an existing dangerous condition and failed to correct it.

Commercial leases customarily require that tenants carry liability insurance coverage, which also protects the landlords from claims resulting from the condition of the premises.

A landlord who knows of a dangerous situation has, at the very least, a duty to warn a tenant.

See *Lundy v. California Realty* (1985) 170 C.A.3d 813.

CASE STUDY A child was bitten by a dog owned by a tenant in a neighboring property not owned by the plaintiff's landlord. In *Wylie v. Gresch* (1987) 191 C.A.3d 412, the parents sued the landlord because they had not been warned of the dog's dangerous propensities. The court held the landlord was not liable because the duty of disclosure applied to the landlord's own property but should not extend to the neighborhood.

A landlord, in some instances, could be liable for injuries occurring off the premises.

CASE STUDY The case of *Barnes v. Black* (1999) 71 C.A.4th 1473 involved a child who died from injuries received when his Big Wheel veered off the sidewalk to the play area, down a steep driveway into a busy street where he was hit by an automobile. The parents sued the apartment owners for negligence, premises liability, and negligent and intentional infliction of emotional distress. Several residents had complained to the apartment manager, who informed the owner of dangers to children passing the steep driveway.

Because the injury occurred in the street, not on the premises, the superior court granted summary judgment for the landlord.

The Court of Appeal pointed out that the fact that the injury was on a public street was not controlling.

The scope of the landlord's duty of care is related to the foreseeability of harm and the closeness of connection between the defendant's conduct and the injury. The Court of Appeal reversed.

CASE STUDY The case of *Tan v. Annel Management Co.* (2008) 162 C.A. 4th 621 involved a tenant who upon returning to his apartment around midnight could only find a parking space in the ungated leasing office parking lot (the tenant parking lot was gated). As he was parking, the tenant was attacked and shot in the neck, and his car was stolen. The tenant was rendered a quadriplegic. In a lawsuit against the apartment owners and property manager, it was alleged that there was failure to protect the tenant against foreseeable criminal acts of third parties. In the two years before the attack, three violent attacks occurred in the ungated areas of the project. The trial judge dismissed the action because the shooting was not foreseeable. There had been no prior carjackings involving a gun.

The Court of Appeal reversed and sent the case back for a jury trial, reasoning that the three prior criminal attacks put the parties on notice of foreseeable future criminal acts. The court noted that the cost of a security gates was minimal, about \$14,000 for the 620-apartment project. The duty to act is determined by balancing foreseeability against the burden of security measures.

CASE STUDY The case of *Madhani v. Cooper* (2003) 106 C.A.4th 412 involved a plaintiff who complained to the landlord about an aggressive and verbally abusive new tenant. Continued problems were met by continued assertions by the building manager that they would take care of the problem. The problem tenant caused further problems. He allegedly shoved the plaintiff's mother. There were at least six complaints to the manager. The abusive tenant then allegedly followed the plaintiff into her apartment, pulled her out, hit her, and threw her down the stairs. Plaintiff suffered numerous injuries. When plaintiff sued the landlord for negligence, the superior court granted summary judgment for the landlord.

The Court of Appeal reversed stating, "It is difficult to imagine a case in which the foreseeability of harm could be more clear." The court held that there was a close connection in landlord's failure to react to at least six reports of the violent and threatening behavior of the tenant and the harm suffered by Madhani.

This case basically held that a landlord who knows of a dangerous situation under the landlord's control has a duty to prevent harm to a tenant.

CASE STUDY The case of *McDaniel v. Sunset Manor Co.* (1990) 220 C.A.3d 1 indicates any landlord who undertakes to protect a tenant can be liable if she does so negligently. The plaintiffs resided in a large, federally subsidized complex having approximately 300 children. The defendant had constructed a wood fence 857 feet on one side and 400 feet on the other. Evidence was given that holes in the fence would develop, and sometimes a week would pass before a hole was repaired. The plaintiff's two-year-old child was found floating in the creek on the other side of the fence. She suffered brain damage and quadriplegia, having apparently crawled through a large hole in the fence. The Court of Appeal noted that simply because the injuries occurred on adjacent property did not automatically bar recovery. In constructing the fence, Sunset Manor Company affirmatively assumed a duty.

Note: This case sends a message to landlords that they shouldn't build a fence because if they do so and the fence is not kept in good repair, they could be liable for injuries on adjacent property.

CASE STUDY In the case of *Barber v. Chang* (2007) 151 C.A. 4th 1456, the owner of an apartment building, Chang, was notified by certified letter by a tenant that Daniel, another tenant, had threatened her and aimed a shotgun at her. About three weeks later, Barber, a former tenant, visited the property and Daniel accused him of stalking his family. He produced a shotgun and shot Barber in the leg; he then kicked out one of Barber's teeth and again shot Barber in the leg. Barber sued Chang for negligence alleging he owed Barber a duty of reasonable care.

Chang moved for summary judgment on the grounds that he owed no duty of care to a visitor and it would be unreasonable to expect him to hire security guards.

The Court of Appeal reversed, ruling the assault was foreseeable. There was a matter of fact for the jury as to whether Chang reasonably responded to the notice by not evicting Daniel. Foreseeability is a crucial factor in determining not only the existence of the landlord's legal duty, but its scope. The case was remanded for trial.

CASE STUDY The case of *Davis v. Gomez* (1989) 207 C.A.3d 1401 involved Ms. Townsend, a tenant in the defendant's building who began to "deteriorate." Besides being observed talking to herself, she allegedly attempted to cast spells on other tenants. Other tenants alleged they had seen a gun in her apartment. Tenants complained to the manager about her behavior. Subsequently, she shot and killed another tenant. The parents of the victim sued the landlord for damages.

The court held that the landlord had no duty to check Townsend's background before renting. The landlord was also not qualified to judge whether she was psychotic. If the landlord had evicted Townsend, the landlord might have been subject to liability. While her conduct was bizarre, it had not been violent. Townsend was more of a nuisance than a danger. A landlord's failure to eliminate a nuisance is not the same as a failure to prevent a serious criminal act. In this case, it was not foreseeable that she would shoot another tenant.

CASE STUDY In the case of *Castaneda v. Olsher* (2007) 41 C. 4th 1205, Castaneda was shot by a stray bullet during a gang fight in the mobile home park where he lived. Castaneda sued the park owners alleging they breached a duty not to rent to known gang members or to evict them when they harassed other tenants. Vitoria, who lived across the street in Space 23, had fired the shots. Several months before the shooting, a complaint was made about the occupants of Space 23 to the manager. The manager notified the owner about gang-related problems and was told, "Their money is as good as yours."

At trial, testimony was given that people dressed like gang members congregated at Space 23. Castaneda's attorney argued that the park should not have rented to gang members, should have evicted the gang members after the complaint, should have hired security guards, and should have repaired shot-out street lights. The superior court granted a nonsuit because plaintiff failed to show prior similar incidents such that a shooting was highly foreseeable.

The Court of Appeals reversed and remanded for trial, stating plaintiff presented evidence that the park was aware they were renting to gang members and that there was a duty to undertake security measures to protect residents.

On appeal, the California Supreme Court reversed the decision, stating a landlord owes a tenant a duty, arising out of their special relationship, to take reasonable measures to secure areas under the landlord's control against foreseeable criminal acts of third parties. The court then explained a landlord does not have a duty to refuse to rent to or evict gang members without evidence of foreseeability of harm to other tenants or guests. The court noted that the mobile home residency laws limit park owners to only two grounds for refusing to approve a tenant: (1) lack of ability to pay park rent and charges and (2) a reasonable determination based on prior tenancies that the tenant will not comply with park rules and regulations.

The court also stated that, because of lack of foreseeability, the owner had no duty to hire security guards or install brighter lighting. A shootout between two rival gangs was not highly foreseeable.

Note: A refusal to rent to a suspected gang member could be discriminatory based on race or ethnicity, dress, appearance, or reputation, which could subject a landlord to liability.

CASE STUDY The case of *Myrick v. Mastagni* (2010) 185 C.A. 4th 1082 involved two women who were killed when a building collapsed in an earthquake. The trial court found the owners negligent for failing to perform seismic retrofitting and awarded \$1.9 million damages.

On appeal, the defendants contended they had no duty to retrofit. A city ordinance did not require retrofitting until 2018. The Court of Appeal indicated that compliance with an ordinance is not a defense as to negligence. The ordinance set the minimum standard of conduct. The owners must use ordinary care that a reasonable person would use in view of the probability of injury. The trial judgment was upheld.

Occupational Safety and Health Act (OSHA)

Owners and property managers having seven or more employees require compliance with OSHA safety standards, recordkeeping and reporting. OSHA can assess fines up to \$7,000 for a single violation and \$70,000 for a repeated willful violation.

Security

A landlord who represents a building to be secure or indicates it is protected by a security service or device and then fails to maintain security could subject the landlord to liability.

Failure of a landlord to take reasonable measures to correct a security problem after becoming aware of the problem also could subject the landlord to liability. Civil Code 1941.3 requires that landlords install and maintain security devices in residential structures, which include deadbolt door locks, security or locking devices on windows and sliding doors, and specified locks on doors to common areas.

RIGHTS AND RESPONSIBILITIES OF TENANTS

Quiet Enjoyment

There is an implied warranty in a lease that the landlord will not interfere with the tenant's **quiet enjoyment** of the premises. Civil Code Section 1927 requires that the lessor secure quiet enjoyment of the lessee against all people lawfully claiming the premises. A landlord who harasses a tenant by making unnecessary repairs, or encourages other tenants to disturb the tenant, has breached the tenant's right to quiet enjoyment.

Tenant Repairs

If, after a reasonable period of receiving written or oral notice, the landlord fails to make needed repairs, the tenant can make the repairs necessary to make the premises habitable, spending up to one month's rent. The tenant then can deduct the expenditures from rent payments. The tenant can use this remedy no more than twice during any 12-month period (Civil Code Section 1942). As an alternative, the tenant may consider

the landlord's failure to make the premises habitable a breach of the lease and vacate the premises, relieved of all further lease obligations.

A tenant who acts to make repairs after the 30th day following a notice to repair is presumed to have acted after a reasonable notice. California courts have allowed another remedy: they will allow a tenant to remain in possession and pay a reduced rent, based on the reduction of usefulness of the premises, when the landlord fails to maintain a habitable dwelling (*Hinson v. Delis* (1972) 26 C.A.3d 62).

CASE STUDY In the case of *Schulman v. Vera* (1980) 108 C.A.3d 552, a commercial tenant raised as a defense in an unlawful detainer action that the owner had breached a covenant to repair. The court held that the tenant could not remain without paying rent. The court refused to extend the breach of an implied warranty of habitability as a defense available to commercial tenants.

Additional Tenant Rights

The tenant may

- install a satellite dish within area tenant controls,
- install an electric vehicle charging station that meets minimum standards, and
- engage in agriculture in portable containers meeting minimum standards.

Duties of Tenants

The tenant's duties include

- paying rents and other charges as agreed, the landlord may not require that rent be paid in cash unless the tenant had previously failed to pay the rent;
- keeping the premises under control in a clean and sanitary manner and disposing of garbage and trash properly (unless the lessor by agreement has taken this responsibility);
- exercising reasonable care in the use of plumbing, electrical and gas fixtures, and appliances.
- not permitting others to damage or deface the premises and not doing so herself;
- using the premises for the purpose for which they were intended to be used;
- using the leased premises for a lawful purpose; and
- complying with reasonable rules. A residential landlord can prohibit smoking of tobacco products if stated in the lease. For existing tenants a notice of change of the terms of tenancy must be given.

CASE STUDY The case of *Sachs v. Exxon Co., U.S.A.* (1992) 9 C.A.4th 1491 involved refusal by the tenants to allow the landlord to conduct soil-contamination tests.

The landlord contended that leakage from tanks could damage the soil for which the landlord could be liable under state and federal laws. The trial court determined in favor of the lessee, but the decision was reversed by the Court of Appeal.

The lease required the tenants to comply with all laws and ordinances. The court pointed out that there is an implied covenant of good faith and fair dealing in the lease that provides a reasonable means for the landlord to get assurance of protection as to environmental hazards.

CASE STUDY The case of *Brown v. Green* (1994) 8 C.4th 812 involved a dispute between a landlord and a tenant as to responsibility for compliance with an order for asbestos abatement in a commercial building.

The trial court determined that the language of the lease required the tenant to remove and clean up the asbestos, and the superior court affirmed. The supreme court concurred the 15-year lease was a net lease for an entire warehouse building. The tenants were sophisticated business partners with substantial experience in leasing commercial property. Before the execution of the lease, they were on written notice of a potential for asbestos contamination; however, they failed to conduct any investigation. The court pointed out that the cost of the asbestos removal only amounted to 5% of the total rent due on the lease.

Note: The court's consideration of the term of the lease, cost of repair, and sophistication of the tenant leaves the impression that if the tenant were less sophisticated, the lease were for a shorter term, and the cost to comply was great, then a different decision might have been made.

THE EVICTION PROCESS

“Self-help” evictions, such as removing doors, changing locks, seizing tenants’ property, and engaging in extreme harassment could subject the landlord to damages, as well as require the landlord to return the premises to the tenant (Code of Civil Procedure Section 1174).

Evictions usually start with a **three-day notice** to quit, to quit or cure, or to quit or pay rent. The three-day notice applies only to court days, so it does not count weekends or holidays.

Landlords can only evict for just cause, and the reason for eviction must be stated in the eviction notice.

Notice to quit must be served in the following manner:

1. A copy of the notice must be delivered to the tenant personally.
2. If the tenant is absent, a copy must be left with a resident over the age of 18, and a copy must be sent through the mail to the tenant's place of residence.

Because of COVID-19, there was a moratorium on tenant evictions for one-to-four-unit residential properties when COVID-19 was the cause of financial hardship. This moratorium has expired.

CASE STUDY The case of *Camacho v. Shaefer* (1987) 193 C.A.3d 718 involved a self-help eviction action. The tenant had withheld rent because only one electrical outlet functioned, there were holes in the bathroom ceiling, there was no hot water or gas, and the apartment was infested with roaches and rats. The owner came to the apartment and removed the sofa, beds, table, and chairs. The tenant then obtained a restraining order against the landlord, but the landlord returned, forced the door open, breaking the chain, and removed the refrigerator. The Court of Appeal upheld compensation and punitive damages, as well as attorney fees, totaling \$32,600 for the defendant's failure to follow unlawful detainer procedures.

3. If the tenant's place of residence or business cannot be found, or if a person of suitable age or discretion cannot be found, a copy of the notice may be affixed in a conspicuous place on the property; a copy should be given to a person residing on the property, if applicable; and a copy must be mailed to the property address by first-class mail. This process is informally called "nail and mail."

If the tenant does not quit, cure, or pay rent, the lessor may initiate an **unlawful detainer action** to evict the lessee. An unlawful detainer action can be used not only against a tenant who fails to pay rent or to perform conditions or covenants of the lease but also against a tenant at sufferance.

For an unlawful detainer action, the landlord must allege that

- proper three-day notice was given and the tenant is still in possession, and
- rent is due or a condition of the lease has been breached.

The summons issued requires that the defendant (tenant) appear and answer the charges within five days after service.

If the tenant fails to respond within five days, a default hearing is set, and the court can issue a **writ of possession**. After service of the writ on the tenant, the tenant has five days to vacate, or the tenant can be evicted physically by the sheriff.

A tenant who does respond can appear and claim a defense, such as a denial, or that the landlord breached a condition or covenant, that the landlord failed to keep the premises in a habitable condition, that the landlord failed to cure lead defects, that the rent has

been paid as agreed, that the tenant made an appropriate deduction from the rent, and so forth. The court then will decide on the facts and enter either a judgment for the landlord, entitling the landlord to a writ of possession, or a finding for the tenant, in which case the eviction will fail.

If the tenant delivers possession before trial or before judgment, the unlawful detainer action can be allowed to continue as a civil claim for damages.

Because the landlord is an unsecured creditor of the tenant, the landlord has no lien against the personal property of the tenant for rent.

Inventory of property left on the premises must be taken and verified by an enforcing officer. A tenant's personal property remaining on the premises after they are restored must be stored by the owner for 30 days and may be reclaimed by the tenant during that period upon payment of reasonable storage costs.

Any property not redeemed by the tenant within 30 days may be sold at a public sale, and the proceeds may be used by the owner to pay the costs of storage and sale. Any balance remaining after payment must be returned to the tenant.

A landlord can sue on each rent installment as it becomes due. Usually, however, the landlord retakes possession through eviction proceedings and sues the tenant at the end of the term for damages in the amount of the difference between the lease rental and any lesser amount obtained by reletting.

A landlord has a duty to mitigate damages after retaking possession. The landlord must use reasonable efforts to rerent to keep the damages as low as possible.

CASE STUDY The case of *Kumar v. Yu* (2011) 201 C.4th 1463 tenant Yu was evicted with owing rents of \$14,174.86. The property was then leased to another tenant who was later released from the lease and then leased to a third tenant at a substantially higher rent. When the original lease expired, the landlord sued Yu for lost rent. The trial court ruled for Yu because the mitigated rents received exceeded the rents due under the original lease. The court awarded Yu, the prevailing party, attorney fees of \$55,396.48.

Note: Mitigated damages applies to rents due as well as future rents after eviction.

CASE STUDY The case of *Chen v. Kraft* (2016) 24 C.4th 13 involved an Airbnb rental. The landlord, Chen, filed an unlawful detainer complaint against Kraft, asserting that Kraft failed to comply with 10-day notices to cease subletting the unit on short-term rentals (Airbnb). The property was zoned R-1, and Los Angeles prohibits short-term tenants in the zoning.

The defendant claimed that the previous owner approved the rentals, and sharing a unit is legal (tenant retained use of loft). The landlord moved for summary judgment, alleging the tenant was operating an illegal bed and breakfast or hotel type occupancy.

The trial court ruled the tenant's use violated the zoning ordinances.

The Court of Appeal affirmed ruling that the defendant's use was an illegal purpose and the owner was entitled to evict.

Immigration Status

A landlord in California cannot take action against a tenant based on immigration status, and public agencies cannot require landlords to report citizenship status.

Foreclosure

Under the federal Protecting Tenants at Foreclosure Act, tenants in foreclosed property have the right to remain in possession until their lease expires, unless the owner will be occupying the property as a principal residence. If so, the tenant is entitled to a 90-day notice to vacate. If the tenant is on a month-to-month tenancy, there must be a 90-day notice to terminate tenancy after foreclosure.

Unlawful Detainer Assistants

A number of people have gone into business offering assistance to people being evicted. They would help tenants file questionable counterclaims and come up with, in some cases, defenses based on other than facts. Because of these abuses, Business and Professions Code 6400 et seq. requires that such assistants be registered and post a \$25,000 bond. The advertisements of these assistants require disclosures, and if landlords or managers are awarded damages for acts of a registered assistant, they can recover their damages from the bond.

Retaliatory Eviction

A landlord cannot decrease services, increase rent, or evict within 180 days after a tenant exercises a protected right, including

- complaining to the landlord about the habitability of the premises,
- complaining to a public agency about defects, and
- lawfully organizing a tenant association.

Tenants cannot waive their rights of defending against such **retaliatory evictions**. If a landlord can be shown to have acted maliciously, the tenants will be entitled to receive from \$100 to \$2,000 in punitive damages.

CASE STUDY The case of *Vargas v. Municipal Court* (1978) 22 C.3d 902 concerned farm workers who received free housing as part of their compensation. The workers were fired for organizing a union and given notice to vacate their premises. The tenants raised the defense that their employment had been wrongfully terminated. The California Supreme Court held that, even though the employees had redress through labor legislation, wrongful discharge was a valid defense against eviction. The employees were not deprived of the defense of retaliatory eviction.

Domestic Violence

A landlord cannot terminate or refuse to renew a lease because the tenant was a victim of domestic violence. Protection is waived if the victim allowed the perpetrator to visit the property. The landlord must rekey at the tenant's request within 24 hours of written proof that a court protection order is in effect.

Menace

While a landlord may properly offer a tenant an inducement, such as cash, to vacate, it is unlawful for a landlord to attempt to influence a tenant to vacate a rental unit by force, threat, extortion, other menacing acts, or by interfering with a tenant's quiet enjoyment of the premises. A tenant may recover up to \$2,000 from the landlord for each unlawful act.

Constructive Eviction

An act of the lessor that is inconsistent with the quiet enjoyment of the lessee or the implied covenant of habitability can be treated by the lessee as being **constructive eviction**, that is, equivalent to eviction. The tenant may vacate and will be released of all further obligations under the lease. If a tenant fails to vacate within a reasonable period after a noncontinuous act by the lessor, the tenant may waive his or her rights to declare the act to be constructive eviction.

Examples of acts, or failure to act, that could constitute constructive eviction include

- failing to make required repairs,
- failing to maintain the premises in a habitable condition,
- making needless or unnecessary repairs that interfere with the tenant's peaceful possession,
- interfering with the tenant's access to the premises,
- harassing the tenant,

- leasing the premises to another party,
- wrongfully entering the premises by the landlord, and
- cutting off utilities to the tenant.

A landlord who cuts off utilities, removes doors, removes tenant property, or prevents access to the premises will be subject to a penalty of \$100 per day, but, in no event, less than \$250 for each cause of action (Civil Code Section 789.3).

CASE STUDY The case of *Segalas v. Moriarty* (1989) 211 C.A.3d 1583 involved a landlord who sued for unpaid rent. The tenant cross-complained, alleging constructive eviction because remodeling in another part of the building had produced disruptive noise and inconvenience. The court held that a tenant who fails to vacate within a reasonable time after the breach waives the right to claim constructive eviction, with the exception of a tenant who commits to leasing other space before the breach is cured. In this case, Moriarty did not commit for other space until three months after the remodeling was finished, so the court held that he had no valid claim for constructive eviction.

Surrender

A **surrender** terminates all further obligations under the lease. Surrender is the turning over of possession by the tenant with the understanding that all future obligations are canceled. A new lease is considered a surrender of the obligations of the old lease.

When a tenant moves out and the landlord retakes possession, the landlord should inform the tenant that the tenant is still liable under the lease, that the landlord will attempt to rerent the premises to mitigate damages, and that taking possession is not an agreement to surrender of the premises.

MOBILE HOME TENANCIES

While the sale or lease of five or more lots in a mobile home park falls under the jurisdiction of the real estate commissioner under the Subdivided Lands Law, the rental of two or more lots in a mobile home park falls under the jurisdiction of the state Department of Housing and Community Development.

Mobile homes are not really mobile. Double-wide and triple-wide units generally are not intended to be moved after they are set in place. The addition of awnings, porches, and even permanent foundations makes removal extremely costly. Because of the special nature of mobile homes, the rights of landlords and tenants differ from those in other tenancy situations.

Tenants in mobile home parks are entitled to a 60-day notice to terminate. This 60-day notice also applies to rental increases and tenants who wish to terminate their leases.

Tenants in a mobile home park are entitled to a 12-month lease upon request at the prevailing month-to-month charge. A copy of the Mobile Home Residency Law must be attached to all rental agreements.

Park management must provide a written disclosure form that discloses any park defects in common facilities or utilities to lessees at least three days before signing the park's rental agreement. A signed copy of the rental agreement must be given to the tenant within 15 days.

Leases cannot prohibit a homeowner from keeping at least one pet subject to reasonable park rules.

A mobile home park can require that a single-wide mobile home 17 years old or older be removed from the park when sold. Other mobile homes must be 25 years old or older to require removal upon sale. (Mobile home park management is limited in requirements as to exterior repairs upon a sale or transfer of a mobile home.)

Park rental agreements may not include a right of first refusal for the park management to buy the mobile home unless there is a separate agreement with separate consideration paid.

Eviction

Tenants can be evicted from mobile home parks only under the following circumstances:

- A tenant who fails to comply with a local or state law within a reasonable time after being notified of a violation can be evicted.
- A tenant who fails to comply with reasonable park rules and regulations that were either in the rental agreement or agreed to later by the tenant can be evicted. If, however, the rules were established without tenant permission, the tenant is entitled to a six-month notice to terminate. To change park rules, other than for recreational facilities, the park owner first must give six months' notice. Any rule violation must be spelled out, and the tenant must be given seven days to comply before notice to terminate tenancy.
- When the tenant's use interferes with the quiet enjoyment of (causes substantial annoyance to) other tenants, the tenant can be evicted.
- A tenant who fails to pay rent or other reasonable charges can be evicted.
- A park owner can evict the tenant from a mobile home park with a 60-day notice if the tenant has received more than three 3-day notices within a 12-month period for nonpayment of rent, utility charges, or reasonable incidental expenses. However, the legal owner, as well as junior lienholders, have a 30-day window to cure (this applies to individual lienholders, not financial institutions or mobile home dealers).
- A tenant convicted of prostitution, assault with a firearm, possession of illegal firearms or munitions, battery resulting in serious bodily harm, or a felony-controlled substance offense, if the offense was committed on the mobile home park premises, can be evicted.

- If the park is condemned, its tenants can be evicted.
- When the use of the park is changed by the owner, tenants can be evicted. For changes in park use, the tenant is, however, entitled to 15 days' notice for appearances before local governing boards, and 6 months' notice of termination after approval of the changes. If no local approvals are needed, the park owner must give tenants 12 months' notice.

Other Rules

The lessor cannot terminate a tenancy to accommodate other mobile homes sold by the park owners.

Mobile home parks cannot require a cleaning deposit or liability insurance from tenants for use of the clubhouse or recreational facilities for meetings of residents and invited guests.

If a tenant in a mobile home park has made timely payments of rent, utilities, and other charges for a period of 12 months, the security deposit must be returned to the tenant within 60 days of request.

Mobile home parks cannot unreasonably refuse to approve a new purchaser or lease assignment or a new lease. The park may reject a new purchaser who has financial ability only on the basis of prior tenancy problems or failure to obey park rules.

Parks may not charge a fee for the sale or transfer of a mobile home if no services are performed.

Mobile home parks cannot charge a move-in fee unless a service is rendered for the fee (Civil Code Section 798.72).

Mobile home parks cannot require that sale listings be given to the park management or prohibit outside agents from listing for sale a mobile home in a park (Civil Code Section 798.71).

Parks cannot charge any fee for a lessee's guests who stay for 14 days or less (annually, not consecutively).

Mobile home parks cannot require submission of an applicant's income tax returns; however, an applicant can be required to document gross monthly income (Civil Code Section 798.74).

Parks cannot charge extra for larger families or discriminate based on family size.

Tenants in mobile home parks cannot waive any of their rights under the law.

Park owners cannot enter mobile homes without the written permission of the owner, except in emergency situations.

A park owner who enters into a listing agreement to sell the park must provide written notice to the residents association not less than 30 days or more than one year before entering into the agreement or making an offer to sell.

Homeowners groups must be permitted to hold meetings in recreation halls during reasonable hours.

CONDOMINIUM CONVERSIONS

For conversion of existing residential units to a condominium project, a community apartment project, or a stock cooperative, certain actions are required of the subdivider:

- At least 60 days before the filing of a tentative map, written notification of this intention must be provided to the tenants.
- Tenants also must receive at least 10 days' notice of application for a public report.
- Each tenant must be notified within 10 days of approval of the final map for the proposed conversion.
- Each tenant must be given 180 days' written notice of intent to convert before termination of tenancy.
- Each tenant must be given at least 90 days' notice from the date of issuance of the public report of an exclusive right to purchase the unit the tenant occupies, on the same terms and conditions under which the unit initially will be offered to the public.

A subdivider who wishes to convert a mobile home park to another use must file a report about the impact of the conversion on the displaced residents of the mobile home park. The report must address the availability of adequate replacement space in mobile home parks. The subdivider must make a copy of the report available to each resident of the park at least 15 days before the hearing on the map by the advisory agency (planning commission).

RENT CONTROL

Rent control has been held to be a legitimate government purpose. The argument that rent control violates an owner's due process rights because tenants are in the majority and always will vote in favor of rent control was rejected by the court in *Birkenfield v. City of Berkeley* (1976) 17 C.3d 129. In the same case, a prohibition on evicting a tenant in good standing at the end of the lease unless the property is withdrawn from the rental market, or the tenant refuses a new lease, was considered a reasonable means to enforce rent control.

The Ellis Act, Government Code Section 7060.7, allows a landlord to go out of business and withdraw property from the rental market.

CASE STUDY The case of *Channing Properties v. City of Berkeley* (1993) 11 C.A.4th 88 involved a landlord who wanted to remove 33 apartments from the rental market. Berkeley's Municipal Code requires that (1) tenants be given a 180-day notice to move, (2) the landlord pay \$4,500 per unit for relocation costs, and (3) the city be notified at least 60 days before terminating the rentals. Section 7060 of the Government Code (the Ellis Act) requires only a 60-day advance notice to tenants and requires relocation payments only to low-income hotel residents. The Court of Appeal held that the Ellis Act preempts local action with respect to landlords who wish to withdraw accommodations from the rental market. The court noted that the Berkeley ordinance would create insurmountable obstacles for removal of rental units, and that was contrary to the intent of the Ellis Act, which allows rental removal regardless of local laws.

Because of fixed rents, landlords under rent control often reduce maintenance and defer repairs. In the case of *Sterling v. Santa Monica Rent Control Board* (1984) 162 C.A.3d 1021, the court held that the rent control board could reduce rents for Health and Safety Code violations.

The **Costa-Hawkins Rental Housing Act** (Civil Code Section 1954.53) provides that landlords who are subject to rent control are free to establish new base rents for new tenants, as well as for sublessees and assignees, where the landlord's consent is necessary for the sublease or assignment.

The Costa-Hawkins Act also prohibits cities and towns from imposing rent control on structures erected after 1995 as well as a single-family dwelling.

CASE STUDY The case of *Guggenheim v. City of Goleta* (2010) 638 F. 3d 1111 involved the rent control ordinance of the City of Goleta that allowed purchasers of mobile homes to assume the lease of the seller at the rent-controlled amount. The effect of the ordinance was that existing owners of units were able to sell their mobile homes for \$100,000 more than they were worth, based on the ability to take over the unit at the existing rental rate. The park owners brought this action in federal court, claiming a taking of their park without compensation, a violation of their Fifth Amendment rights.

The trial court ruled against the park owners, but the Court of Appeal reversed. The court pointed out that the rent control ordinance resulted in a transfer of 90% of the value from the park owners to the tenants. Because the park rent was below market, buyers had to pay a premium price, which went to the tenant who sold the unit.

Note: The purpose of rent control was to protect the tenant and provide reasonable-cost housing, not to provide windfall profits to tenants. (The Costa-Hawkins Rental Housing Act (Civil Code Section 1954.50 et seq.) is not applicable to mobile home parks, so a new base rent could not be established with a new tenant.)

Note: The Supreme Court declined to review this decision.

Rent control can result in tenants getting the advantage of appreciation in value at the expense of the property owner.

In California, residential properties are subject to a 5% annual rent increase plus inflation. Exempt from the increase are the following:

- Single-family homes and duplexes that are owner-occupied
- Condominiums not owned by a corporation or real estate investment trust (REIT)
- Mobile homes
- Communities that have their own rent-control laws
- Housing where a certificate of occupancy was issued within the past 15 years

CASE STUDY The case of *Bisno v. Santa Monica Rent Control Board* (2005) 130 C.A. 4th 816 involved the Costa-Hawkins Rental Housing Act (Civil Code 1954.50 -1954.545), which allows for market-rate rent increases when a rent-controlled unit becomes vacant. Santa Monica adopted Regulation 3304, which permits a landlord to petition to increase rent to the market-rate vacancy rates when the unit is not the principal residence of the tenant.

The Bisnos rented their apartment in 1996, before Regulation 3304. After passage of the regulation, their landlord petitioned for a rental increase because the unit was not the principal residences of the tenants. A rental increase was granted from \$1,111 per month to \$4,295 per month, which was later reduced to \$4,045 per month.

Bisno sued the Rent Control Board, alleging that the Costa-Hawkins Act did not provide for rent increases based on principal residence criteria. The Los Angeles Superior Court ruled that Regulation 3304 was valid and the Court of Appeal affirmed, ruling that allowing rent increases for nonprincipal residences was consistent with the purposes of local rent control law and was, therefore, valid.

Note: The purpose of rent control was not to allow bargain rents for weekend retreats (the unit was at The Shores), but to protect renters from being forced out of their homes.

SUMMARY

Leasehold interests include

- tenancies for years (leases for a definite period of time),
- periodic tenancies (leases that automatically renew themselves unless a notice to terminate is given),
- tenancies at will (tenancies at the pleasure of the lessor), and
- tenancies at sufferance (tenancies in which the lessee holds over, which also are not true tenancies in California because the lessor can treat the holdover tenant as a trespasser).

Leases are personal property (chattels real). Leases for one year or less need not be in writing. For written leases, the lessor must sign to be bound. The lessee can be bound without signing by moving in or paying rent after receiving a copy of the lease.

When a lease contains an option, part of the rent will be considered consideration for the option.

Nonrefundable security deposits are not allowed. The total security deposit cannot exceed three months' rent for furnished rentals or two months' for unfurnished units.

An assignment of a lease is a transfer of all interests by the lessee to a third party, who becomes a tenant of the original lessor. The assignee becomes primarily liable under the lease, while the assignor (original lessee) remains secondarily liable.

Under a sublease, the original lessee becomes a sublessor and leases the premises to a sublessee. The sublessee is the tenant of the sublessor (original lessee) and not the tenant of the original lessor (owner).

A lease can be terminated by or for destruction of premises, eminent domain, commercial frustration, merger, bankruptcy of tenant, expiration of term, notice, foreclosure of a prior encumbrance, failure to pay rent, failure to give possession, violation of a material lease provision, illegal use of the premises, abandonment, surrender, violation of implied warranty, or failure to make needed or agreed-on repairs.

The landlord has the right of entry in an emergency, when the tenant consents, after reasonable notice to make repairs or show the premises, when the tenant has abandoned or surrendered the premises, and under court order.

A residential lease has an implied warranty of quiet enjoyment and habitability. As a minimum, the landlord must ensure that

- plumbing is in proper working order;
- heat, lights, and wiring work and are safe;
- floors, stairways, and railings are in good condition;
- the premises are clean and free of pests when rented;
- areas under lessor control will be maintained; and
- the roof will not leak, and no doors or windows are broken.

Landlords are liable for injury to others because of the landlords' negligence. Landlords also have been held liable for injuries to the tenant because of the condition of the premises, even when the lessor was unaware of the problem. Exculpatory clauses in residential leases do not protect the landlord.

Tenant duties include

- paying rent and other charges as agreed,
- keeping the premises in a clean and sanitary condition,

- exercising reasonable care in the use,
- not permitting others to damage or deface the premises, and
- using the premises for the purpose intended.

If a tenant fails to pay rent or violates a lease condition, the lessor can give a three-day notice to quit, quit or cure, or quit or pay rent. If the tenant does not vacate, cure, or pay rent, the lessor serves an unlawful detainer action on the tenant. The tenant must appear and answer the charges within five days or the court will issue a writ of possession that, after service, gives the tenant five days to vacate.

An eviction within 180 days of the tenant's complaining about habitability of the premises to the landlord or a public agency or lawfully organizing a tenant organization will be considered a retaliatory eviction. The tenant can defend against an eviction action by claiming that it is retaliatory.

An act of the lessor that is inconsistent with the quiet enjoyment of the lessee or the implied covenant of habitability can be treated by the tenant as being equivalent to eviction (constructive eviction).

Because of the immobility of mobile homes, tenants can be evicted only for limited reasons. Special notices of any change in the use of the park must be provided to tenants. Tenants are entitled to a 12-month lease upon request. Mobile home parks cannot unreasonably refuse to approve a new purchaser for lease assignment or a new lease.

Tenants in apartments being converted to condominiums must be given statutory notices. They also must be given a 90-day exclusive right to buy their units at the price, terms, and conditions at which they initially will be offered to the public.

Rent control has been held by the courts to be a legitimate government purpose. Rent control also can control the right to evict or to change property use.

DISCUSSION CASES

1. A tenant complained to the police that the landlord had molested her minor daughter. The landlord later pleaded guilty to the charge. After the complaint was made, the landlord started eviction proceedings. The landlord claimed that the charge made it impossible to live together peacefully. **Was the landlord's action a retaliatory eviction?**

Barela v. Superior Court (1981) 30 C.3d 244

2. An exculpatory clause in a miniwarehouse lease stated that the warehouse operators would be free from all liability for damage to the property stored and that it was the customer's obligation to obtain insurance coverage. **Does this clause protect the lessor from damage caused by the lessor's negligence?**

Cregg v. Ministor Ventures (1983) 148 C.A.3d 110

3. A tenant defended an unlawful detainer action by claiming that the lessor breached the implied warranty of habitability. **Is this a valid defense? What is habitability?**

Green v. Superior Court (1974) 10 C.3d 616

4. The plaintiff was raped in her apartment. It was alleged that the owners and manager of the apartment complex (the defendants) knew of three previous rapes in the complex. The defendants had been given a composite drawing as well as a description of the suspect by the police.

The defendants did not disclose the information about the assaults to the plaintiff. It was alleged that the premises were represented as being safe and patrolled at all times by professional guards. The plaintiff alleged she was intentionally misled by the defendants to advance their own interests by renting the apartment. If the plaintiff's allegations are correct, are the defendants liable? **If they are liable, what is their liability?**

O'Hara v. Western Seven Trees Corp. (1977) 75 C.A.3d 798

5. An owner had not raised rents on some units for 15 to 20 years. After she finally raised rents, a rent control ordinance rolled back the rents to a time when she was charging below-market rents. The owner filed for a rent increase and was denied. The owner filed for a writ of mandate challenging the base-year rent. **Is the owner subject to the base-year rent?**

Vega v. City of West Hollywood (1990) 223 C.A.3d 1343

6. A lease provided for a renewal option at fair market rental value. The property was used as a movie theater. Appraisals indicated that at the highest and best use (retail stores), the property would have its highest rental value. **For renewal purposes, what should be the basis of the rent?**

Wu v. Interstate Consol. Indus. (1991) 226 C.A.3d 1511

7. In leasing her condominium, an owner told the tenant that the premises were safe and security precautions for tenants had been taken. The condominium association also represented the safety of the complex. After being assaulted, the tenant sued, claiming that security precautions had not been taken. **If the tenant was correct, are the owner and the condominium association liable?**

Olar v. Schroit (1984) 155 C.A.3d 861

8. A tenant leased garage space for the purpose of replacing a truck engine. While the defendant made a down payment on the rent and was given possession, the defendant failed to pay the balance. The owner went into the garage and found auto parts strewn about the garage. The owner contacted law enforcement authorities to ascertain whether illegal activity was taking place. A government investigator found stolen truck parts. The garage was placed under surveillance, and the defendant was arrested when he returned several days later. **Did the landlord act properly?**

People v. Roman (1991) 227 C.A.3d 674

9. In checking a building before purchase, a buyer found several rooms were locked. After purchase, the buyer discovered these rooms were held by a lodge under an unrecorded 10-year lease that the purchaser had not been informed of. **Is the lease valid?**

Scheerer v. Cuddy (1890) 85 C. 270

10. A party injured in an auto accident claimed that a property owner was negligent in maintaining shrubs that obscured the view of motorists. The property had been rented for several years, and the lease required the tenant to maintain the landscaping. **If the tenant was negligent in failing to trim the shrubs, is the owner liable?**

Swanberg v. O'Mectin (1984) 157 C.A.3d 325

11. Before the Santa Monica rent-control ordinance, which also limited removal of units from the rental market, a developer expended \$1,700 for condominium conversion approval, and the final subdivision map was approved. **Is the developer subject to the rent control ordinance?**

Santa Monica Pines Ltd. v. Rent Control Board (1984) 35 C.3d 858

12. The defendants owned six cabins rented to 16 people. The defendants deliberately failed to pay the gas bill, knowing the gas would be cut off and the renters would be forced to leave.

The trial court awarded the plaintiffs compensatory damages of \$7,901 plus \$6,000 per cabin (\$100 per day for 60 days), or a total of \$36,000 in penalties. **Was the trial court's action proper?**

Kinney v. Vaccari (1980) 27 C.3d 348

13. The City of Berkeley passed a tax relief ordinance that required a one-year reduction on commercial leases of 80% of the property tax savings resulting from the passage of Proposition 13. A landlord alleged the ordinance was unconstitutional because it violated the contract clauses of the state and federal constitutions. **Was the ordinance proper?**

Rue-Ell Enterprises Inc. v. City of Berkeley (1983) 147 C.A.3d 81

14. A tenant parked on the street because she was afraid to use her poorly lighted garage space. She was robbed and shot on the street outside her apartment. She sued the landlord alleging negligence for failure to install adequate garage lighting. **Should the landlord be held liable?**

Rosenbaum v. Security Pacific Corp. (1996) 43 C.A.4th 1084

15. A housing-authority lease had a zero-tolerance drug clause. During a lawful search, a tenant's son, who lived on the premises, was found to have four packets of narcotics on the premises. Even though the parents required their son to move out, the parents were evicted. **Was the eviction justified?**

City of South San Francisco Housing Authority v. Guillory (1996) 41 C.A.4th 13

16. Islay Investments managed many apartment complexes. Instead of charging new tenants a security deposit, Islay charged a higher rent for the first month than for the following months. **Did Islay charge an illegal nonrefundable security deposit?**

Granberry v. Islay Investments (1993) 18 C.A.4th 885

17. A commercial lessor conditioned consent to a lease assignment upon a \$30,000 payment plus 75% of the profit from the sale of a business. **Was the requirement enforceable?**

Ilkhchooyi v. Best (1995) 37 C.A.4th 395

18. A mobile home park imposed a new rule requiring occupancy of the registered owner of the mobile home. **Is this rule enforceable?**

Rancho Santa Paula Mobile Home Park Ltd. v. Evans (1994) 26 C.A.4th 1139

19. A two-year-old child was injured after falling through a hall window in an apartment building. The window was 28 inches above the floor. While it had a screen, tenants would remove the screen to throw garbage into a Dumpster. The lease stated, "Children are not allowed to play in hallways, stairways, or other common areas in the project." **Did the landlord have a duty to ensure that a child would not fall through the window?**

Amos v. Alpha Property Management (1999) 73 C.A.4th 895

20. Tenants were 12 months behind in rent. A fire broke out in the garage, and the tenants' personal property was destroyed. **If the fire was the result of the landlord's breach of warranty of habitability, should the landlord be responsible for the tenants' loss?**

Fairchild v. Park (2001) 90 C.A.4th 919

21. A tenant persisted in annoying another tenant in a mobile home park despite many calls to park management. **If the park fails to take action, can the park be liable in damages for emotional distress?**

Andrews v. Mobile Aire Estates (2004) 125 C.A.4th 578

22. Landlords challenged a San Francisco ordinance requiring landlords to pay 5% interest on tenant security deposit. The landlords alleged that for 16 months, the highest interest paid on money market accounts was 2.2%. **Do the landlords have to pay 5% on the deposits?**

Small Property Owners of San Francisco v. City and County of San Francisco (2006) 141 C.A.4th 1388

23. California National Bank's lease had a provision for a lease extension at the prevailing rate but no more than the rent paid for space by another bank. The other bank failed, and the space was broken up and leased for offices and retail use. **Is there a cap on the rent for a lease extension?**

California National Bank v. Woodridge Plaza LLC (2208) 164 C.A. 4th 137

24. A lease contained the disclaimer that statements as to size were only approximations and that the lessee should satisfy itself as to actual size. In a suit alleging that the lessor negligently or intentionally misrepresented the size to induce a higher rent, the trial court ruled that claims as to size were barred by the disclaimers. **Do you agree?**

McClain v. Octagon Plaza LLC (2008) 159 C.A.4th 784

25. Rent control authorities sought to hold a new purchaser for rent overcharge by a prior landlord. **Should the new owner have liability?**

Baychester Shopping Center, Inc. v. San Francisco Residential Rent Stabilization and Arbitration Board (2008) 165 C.A.4th 1000

26. A landlord rented a single-family home. The tenant, unknown to the landlord, was making and storing explosive materials on the premises. A gardener was injured when unstable materials exploded. He sued the landlord for premise liability alleging negligence. **Should the landlord be held liable?**

Garcia v. Holt (2015) 242 C.A.4th 600

27. Landlord Britton unilaterally changed rules for tenants and demanded tenants sign a new lease. While the units were subject to rent control, the landlord's new rules required the backyard to be shared (previously had personal space) the tenants were to have their own garbage service (previously paid by owner), and parking and storage be restricted. **Can the landlord evict a tenant for refusal to sign a new lease?**

Foster v. Britton (2016) 242 C.A.4th 920

28. The City of Los Angeles has a Rent Escrow Account Program (REAP) in which rental units having substantial habitability problems have reduced rent that is placed in escrow. Funds are used to remedy problems. The landlords claimed they were denied due process. **Are the landlords right?**

Sylvia Landfield Trust. v. City of Los Angeles (2013) 729 F.3d 1189

UNIT QUIZ

1. Which estate is of definite duration?
 - a. An estate at will
 - b. An estate for years
 - c. A freehold interest
 - d. A periodic tenancy

2. A tenancy for years *MUST* be created by
 - a. express agreement.
 - b. adverse possession.
 - c. prescription.
 - d. none of these.

3. What is the maximum term for which a home in a rural area may be leased?
 - a. 51 years
 - b. 99 years
 - c. 100 years
 - d. None of these

4. A tenant who remains in possession after giving notice that she would vacate the premises becomes
 - a. a tenant at will.
 - b. a tenant at sufferance.
 - c. an indefeasible tenant.
 - d. none of these.

5. To be enforceable, a written lease must
 - a. describe the premises.
 - b. be signed by the lessor.
 - c. be both of these.
 - d. be neither of these.

6. For a furnished apartment, the total security deposit may *NOT* exceed
 - a. one-half month's rent.
 - b. one month's rent.
 - c. two months' rent.
 - d. three months' rent.

7. The landlord must return the security deposit to the residential tenant within what time frame after regaining possession if there is no damage other than normal wear and tear?
 - a. 7 days
 - b. 3 weeks
 - c. 30 days
 - d. None of these
8. Which statement is *TRUE* regarding the assignment of a lease?
 - a. The original lessee is the sole party liable for the payment of rent.
 - b. It is the same as a sublease.
 - c. The original lessee would retain a right to use the property for a limited time.
 - d. The entire leasehold is transferred.
9. A tenant on a long-term lease at \$500 per month wishes to go out of business. The premises are currently worth \$1,000 per month. You would likely advise the tenant to consider
 - a. surrendering the premises.
 - b. subleasing.
 - c. assigning the lease.
 - d. doing none of these.
10. An assignee of a lessee has a relationship to the lessor of
 - a. sublessee.
 - b. tenant.
 - c. grantor.
 - d. none of these.
11. A tenant on a long-term lease purchased the premises from the lessor. Later, to raise cash, he sold the property to an investor, who gave the tenant a 30-day notice to vacate. What are the rights of the parties?
 - a. The lease preceded the sale; therefore, the tenant prevails.
 - b. Occupancy was constructive notice to the investor of the lease.
 - c. The purchase by the tenant ended the lease.
 - d. Tenant rights were lost by accord and satisfaction.
12. In the absence of a lease provision, when would a landlord have the right of entry?
 - a. During normal business hours after reasonable notice to show to a prospective buyer
 - b. In the event of an emergency
 - c. Either of these
 - d. Neither of these

13. A landlord must ensure all of the following *EXCEPT*
 - a. that the premises are air-conditioned.
 - b. that the premises are clean and clear of pests at the time of rental.
 - c. that the plumbing is in proper working order.
 - d. that the roof does not leak and windows are not broken.
14. Under a residential rental, the tenant must do all *EXCEPT*
 - a. use the premises for a lawful purpose.
 - b. keep the plumbing in proper working order.
 - c. pay rent as agreed.
 - d. keep the portion of the premises under the tenant's control clean and sanitary.
15. Which statement accurately describes the liability of landlords of residential buildings?
 - a. They are liable for injury only if they know of a dangerous situation and fail to act.
 - b. They are not liable for any injury to a tenant if the lease has an exculpatory clause.
 - c. They are liable only for risks that could be foreseen.
 - d. They are liable for injury caused by a dangerous condition if they were negligent in acting or failed to act.
16. The landlord was notified by the residential tenant that the water heater was inoperative and the roof had a bad leak. After reasonable notice, the tenant could
 - a. treat the landlord's failure to act as constructive eviction.
 - b. spend up to one month's rent and make the repairs.
 - c. do either of these.
 - d. do neither of these.
17. When one residential tenant attacks another tenant, is the landlord liable?
 - a. Yes, the landlord is strictly liable for the injury.
 - b. Yes, if a check on the tenant's background would have shown aggressive behavior.
 - c. Probably, if the attack was foreseeable.
 - d. Yes, if the premises were represented as being safe.
18. A three-day notice to quit or pay rent could be used against a tenant who
 - a. violated a lease provision.
 - b. was delinquent in rent.
 - c. used the premises for an illegal purpose.
 - d. did all of these.

19. After a landlord has served an unlawful detainer action, the tenant
 - a. is given 3 days to quit or pay rent.
 - b. has 5 days to answer the charges.
 - c. must vacate within 5 days.
 - d. must vacate within 30 days.
20. When a tenant abandons the premises with three years remaining on the lease, the landlord may *NOT*
 - a. sue for the balance due on the lease.
 - b. consider the abandonment a surrender.
 - c. rerent the premises.
 - d. sue for the rent as it becomes due.
21. Which of the following would constitute constructive eviction?
 - a. Expiration of a tenancy for years
 - b. A notice to quit
 - c. An unlawful detainer action
 - d. The lessor's leasing the premises to a third party
22. A landlord cut off a tenant's electricity because the tenant was delinquent in rent. What would be the likely result of this action?
 - a. The landlord could be subject to a \$100-per-day penalty.
 - b. The landlord could be subject to a \$1,000 penalty.
 - c. No penalty will be assessed if a proper three-day notice was served.
 - d. There will be no penalty if there was a 24-hour notice of service cutoff.
23. When a lessor and a lessee agree to terminate a lease three years before its termination date, the lessee's turning over possession to the lessor is known as
 - a. accord and satisfaction.
 - b. surrender.
 - c. reformation.
 - d. novation.
24. A tenant of a mobile home park may *NOT* be evicted because of
 - a. failure to comply with a reasonable park rule.
 - b. use that interferes with the quiet enjoyment of other tenants.
 - c. forming a tenant organization.
 - d. failure to comply with local or state laws.

25. In a condominium conversion of an apartment building, the residents must be given an option to purchase their units for
- a. 90 days from issuance of the final public report.
 - b. 30 days from the sale announcement.
 - c. 180 days from public hearing.
 - d. none of these.

DISCUSSION CASE ANALYSES

UNIT 1: SOURCES OF LAW AND THE JUDICIAL SYSTEM

Discussion Topics Analysis

For a detailed explanation of the maxims of jurisprudence, you might wish to check West's Annotated California Codes, starting with Section 3509 of the Civil Code.

CC3510—When the purpose or reason for a requirement is no longer present, the failure to meet the requirement should not be punished.

CC3511—Decisions of the same court or higher court should govern in order to maintain harmony and stabilization of the law (*stare decisis*).

In *Childers v. Childers* (1946) 74 C.A.2d 56, the court indicated that it would not rely on precedent if it persists in any absurdity or perpetuates a manifest error.

CC3512—If a person waived rights, that person should not be allowed to later assert those rights to the detriment of another.

In *Noyes v. Schlegel* (1908) 9 C.A. 516, a vendor stated at the time of contract, as well as subsequently, that he did not care how payments were made as long as payment was within the time specified. The court held that the vendor could not declare a forfeiture for delay in making installments.

CC3513—While people may not waive protection afforded to another party, they can waive requirements that benefit themselves. As an example, a seller can waive a provision that prohibits the buyer from assigning a contract. A person cannot waive rights that are against public policy. For example, a buyer cannot generally waive statutory rights to redemption in the event of foreclosure.

CC3514—A person cannot infringe on others by nuisance use of that person's own property. The use of real property is qualified by rights of others to the lawful enjoyment of their property. The maxim implies that one may use one's property in any legal way so long as it doesn't injure others.

In *People v. Gold Run Ditch & Mining Co.* (1884) 66 C. 138, the court held that accompanying ownership of property is a corresponding duty to use it so that it will not abuse the rights of other recognized owners.

The rule also applies to water rights. A person may not unreasonably use water in a manner such that it deprives other water rights holders of reasonable use.

CC3515—A person cannot claim to have been wronged by an act to which that person agreed.

In *Churchill v. Baumann* (1842) 95 C.541, the court found that the plaintiff consented to diverting water and actually aided in the building and maintenance of a dam. The plaintiff's consent to the diversion of water was held to be a complete defense as to the plaintiff's claim for damages caused by the diversion.

CC3516—If parties, by their conduct, place an interpretation on an agreement that is not what they had actually agreed to, their acquiescence waives their right to later object.

CC3517—For example, a convicted murderer cannot inherit from the deceased and a convicted arsonist cannot collect on the insurance. A broker who made a secret profit on a transaction would not prevail in a suit to recover commission. This is really a "clean hands doctrine."

CC3518—Fraudulent transfers may be set aside.

CC3519—A person who accepts benefits through an act of another has created an agency by ratification of the unauthorized act.

CC3520—The innocent party should not be the one to suffer. This rule is applicable to tort law, as well as to the failure of a government official to perform an official duty.

CC3521—An acceptance of the benefits of a transaction is consent to the obligations under it (assignment of rights also assigns obligations).

In *Walmsley v. Holcomb* (1943) 61 C.A.2d 217, the court held that a sublessee in possession in an action for rent could not raise the defense that there was no written assignment of the lease (statute of frauds).

CC3522—Grantor of land landlocked by other land of grantor gives an implied easement.

In *Smith v. Corbit* (1897) 116 C. 587, the court held that transfer of part of the land, when the grantor had used water from a stream for the land, must be presumed to also grant that water necessary for reasonable enjoyment of the part granted.

CC3523—Where there is a legal wrong, the courts must grant an appropriate remedy. It does not apply to rights lost by the statute of limitations. Courts will withhold relief for equitable reasons, such as estoppel, laches, and waiver.

CC3524—If both parties violate the law and are equally at fault (*pari delicto*), the court will not provide remedy. (Because the parties went outside the law to make the agreement, the law cannot be used to enforce it. Parties aren't held equally in the wrong as to usurious contracts).

CC3525—We see this in our recording statutes. Also consider the doctrine of prior appropriation of water.

CC3526—A person is not responsible in tort for an act of God. Acts of God are those which are independent of human agency.

CC3527—Laches is an unreasonable delay in asserting a right that prejudices another party, making the granting of relief inequitable. *Long v. Long* (1948) 76 C.A.2d 716.

In *Goodfellow v. Barritt* (1933) 130 C.A. 548, the court held that reformation to a deed was barred by delaying an action until almost 2½ years after knowledge of the defect of the deed.

Equitable Estoppel—A person can be stopped from raising a defense when, by words or actions, that person permitted or encouraged a course of action. A later enforcement of rights would not be equitable.

CC3528—The substance of words is more important than form. A technicality should not be allowed to defeat justice. The court will place great emphasis on intent of the parties.

In *Weintraub v. Weingart* (1929) 98 C.A. 690, the court indicated that whether an instrument is an assignment of a lease should be determined by the instrument's legal effect and not the form of the instrument.

CC3529—Unless otherwise proven, performance is presumed to be proper.

In *Beckwith v. Sheldon* (1914) 168 C. 742, a party agreed to give a mortgage for consideration received but failed to do so. The court held that equity required that there be an enforceable lien on the property.

CC3530—A right required to be recorded that is not recorded, and that a good faith purchaser for value has no knowledge of, does not exist.

CC3531—A contract that cannot possibly be performed is void. A contract calling for repair or maintenance would end with the destruction of the subject property.

CC3532—A demand for performance need not be made when it would be futile. As an example, if an owner has incapacitated himself from making a conveyance by conveying to another, making demand for the conveyance would be a useless act.

CC3533—Leaving out a nonessential element in a document does not invalidate the document.

Courts have set aside foreclosure for trifling sums. In *Mietzsch v. Berkhart* (1893) 35 P321, a lot sold for \$2.50 for street improvements. Court allowed redemption by paying \$3.90. The doctrine of substantial performance applies where the contractor has substantially performed. The right to compensation should not be defeated because of trivial defects. (Compensation is equivalent to contract price less the cost to correct.)

CC3534—In case of an ambiguity between general and specific provisions of a contract, the specific should govern (*Scudder v. Perce* (1911) 159 C. 429).

CC3535—Words should be given their meaning at the time of use. Actions at the time best indicate intent. In determining the meaning of statutes, courts will consider what was said by legislatures at the time of enactment.

CC3536—A lesser penalty can be imposed than that allowed by statute or contract. Therefore, the power to discharge an employee would include the right of suspension.

A court can award less damages than that asked for. The power of an administrative agency to revoke a license carries with it the power to suspend.

CC3537—Superfluous or unnecessary wording does not destroy or make void an agreement.

CC3538—If parol evidence can make an agreement certain (to clarify an ambiguity), it can be admitted. If the contract is capable of being clarified, it should stand. If, from a description, property can be found and identified, then the description is sufficient.

CC3539—This would apply to a forged deed or agreement otherwise void. However, adverse possession could give purchaser rights.

CC3540—There cannot be an assignment of mortgage lien without assigning the debt.

Easements pass with real property. Incidental rights pass with the premises. A lien against the land would also be a lien against the improvements that go with the land.

CC3541—Contracts that can be interpreted as being lawful or unlawful should be given the lawful interpretation. The law will avoid declaring a contract void if it is feasible to construe a valid agreement consistent with the intent of the parties.

In *Blume v. MacGregor* (1944) 64 C.A.2d 244, the court held that the interpretation given to a deed should be the one to make it effective rather than to defeat it.

CC3542—Courts are bound to place a reasonable and workable interpretation on statutes and contracts.

In *Mitchell v. Whitford* (1920) 49 C.A. 46, the court held that the entire deed must determine whether a description in a deed is uncertain, and the construction put on it must be reasonable.

In *Cilibrasi v. Reiter* (1951) 103 C.A.2d 39, the court held that when a statute is susceptible to two interpretations, a court must give it such interpretation to avoid confusion and absurdity and that is consistent with sound reason and good morals.

CC3543—We can see this in our recording statutes. If a prior grantee fails to record or take possession, that party should suffer for the party's negligence rather than a subsequent good-faith purchaser for value who has no notice of the prior conveyance and records first. The first assignee who notifies the obligor of the assignment prevails over other assignees, even if prior. A person whose negligence allowed a note to be raised should be the one to suffer rather than a later holder.

CC3545—Courts will presume laws have been obeyed unless shown otherwise. Fraud and other wrongful acts will not be presumed but must be proven. There is a presumption by executing a conveyance that the person signing understands the act.

CC3546—In the absence of proof to the contrary, the presumption is that ordinary care was used.

There is a presumption that every deceased person has heirs. There is a presumption that every person has parentage. There is a presumption of sanity unless shown otherwise. There is a presumption of accidental death or suicide.

CC3547—An offer remains open for a reasonable period of time. A license to use continues as long as is usual. Once something is shown to exist, it is presumed to continue. When it is shown that property belongs to a particular person, the law presumes that ownership continues unless shown to the contrary (*Moore v. California—Michigan Land & Water Co.* (1921) 55 C.A.2d 184). Where a principal and agent relationship has existed for an indefinite length of time, there is a presumption in favor of the continuance of the relationship. (*Walter v. Libby* (1946) 72 C.A.2d 138.)

CC3548—We presume transactions to be fair, regular, and legal.

Discussion Case Analysis

1. While the trial court granted a preliminary injunction, the Court of Appeals reversed. The defendants were protected by First Amendment rights of freedom of speech. Procel was protected in spreading truthful information but was barred from entering or blocking the sales office.
2. The Court of Appeals affirmed that the denial of the right to distribute leaflets in the parking lot was proper, as the ban on leaflets was reasonable because of litter and traffic problems. However, the court pointed out that Savage could use his free speech rights in a reasonable time, place, and manner, such as by handing leaflets to patrons passing by on the sidewalk in the shopping center. The court pointed out that the free speech in *Robins v. Pruneyard Shopping Center*, involving political activity, also applied to religious activity.
3. The trial court granted the injunction that was affirmed by the Court of Appeals. The court held that the right to exclude others from your property is a fundamental aspect of property ownership. Note: If the medical center had been within a large shopping center, a different decision would seem to be indicated, based on the *Robins v. Pruneyard Shopping Center* case.
4. The Court of Appeal reversed, ruling that an apartment complex is not a public forum so the owners can prohibit distribution of unsolicited literature. The court noted that *Robins v. Pruneyard Shopping Center* involved a forum open to the public but an apartment complex is private for tenants and invited guests. The Court of Appeal found no violation of free speech rights by denying the association the right to distribute unsolicited literature. **The California Supreme Court upheld the Court of Appeal decision.**

5. The District Court and Court of Appeals found the ordinance unconstitutional, which was affirmed by a unanimous decision of the U.S. Supreme Court, which held that the city had “almost completely foreclosed a venerable means of communication that is both unique and important.” The court stated that such signs may be the only alternative for people of modest means. While the city can regulate signs to prevent cluttering neighborhoods, they cannot entirely prohibit them. Note: Size restrictions could be a proper regulation if reasonable.
6. The Court of Appeals determined that the superior court cannot correct an arbitrator’s award if the arbitrator did not exceed authority. The courts are limited in their review in order to fulfill the expectations of the parties that the award will be binding and final. Note: Parties can be stuck with an arbitrator’s error, even when it is obviously wrong.
7. The superior court granted summary judgment to the landlord enjoining enforcement of the city ordinance. The Court of Appeal affirmed that the ordinance violated procedural due process and is unconstitutional for violation of the Fourteenth Amendment. Note: If this ordinance had been upheld, the landlord would have to evict all residents of the residence without any standards or appeal. The ordinance would require eviction of people who had not been convicted of any crime or even maintaining a nuisance.
8. The court held that listing a property for sale is an invitation to the public to view the interior of the home; therefore, what is observable to the public is observable to a police officer. Police officers can pose as buyers and not violate Fourth Amendment rights.
9. The California Supreme Court held that the right of free speech protected the picketers, even though the picketing may have hurt the mall’s business.
10. The developer was a nonowner of property covered by the CC&Rs, so should be excluded from the benefits of the CC&Rs. The developer was not entitled to arbitration.

UNIT 2: LAW OF AGENCY

1. Breach of fiduciary duty for either a seller’s agent or a dual agent in indicating that property could be obtained at less than listed price. This action was contrary to the best financial interests of the owner. If the agent had given details of the first sale, then it would be a breach of loyalty as well. The agent cannot divulge, without permission, details of a previous offer; confidentiality of the agency must be maintained. A buyer’s agent should properly inform the buyer of what the buyer’s agent knows.
2. The Court of Appeals directed the trial court to direct a verdict against the broker as to both duty and breach. In *White Allen v. Daily* (1928) 92 C.A. 308, the court

held that under a net listing, the agent may, without violating any trust relationship, purchase the property on the agent's own account or act as the agent of others.

This previous ruling does not apply to this case because the agent helped set the price. For the *White Allen v. Daily* ruling to apply, the court held that the price would have had to have been set independently and uninfluenced by the broker. The broker, in this case, had a duty of full disclosure of the relationship of the buyers. Because the agent helped set the price, the agent had a duty of honesty and diligence to make certain it was fair. The Court of Appeals directed the trial court to direct a verdict against the broker as to both duty and breach.

3. Broker had a duty to disclose to the principal any knowledge that the broker possessed that might have influenced the owner of the property. The court determined in this case that the broker's right to the commission does not apply because **the broker had not acted in the utmost good faith toward his principal.**
4. Broker breached the duty of honest dealing by making the false declaration. In this case, the borrowers did not have knowledge of the defendant's dual agency, so the broker had made a secret profit. **The mortgage broker had a duty of full disclosure.** (In California, all parties would have to agree to the compensation.)

The court determined the broker should forfeit the commission to the borrower. In similar cases, courts have required that secret profits be turned over to the principal.

5. The court held that the entire transaction was tainted by a breach of duties. The buyer overpaid \$15,000 so that the brokers could get their commissions. **The court held that the entire \$15,000 could be recovered as secret profit from those brokers who jointly received it.**
6. A failure to indicate relationship with the purported purchaser. **A failure to indicate that he, in fact, was to be the purchaser. Failure to act in good faith is a violation of duties of full disclosure and honest dealings, as well as fiduciary duties.** It was apparent from the broker's dealings that he believed the property was worth considerably more than the price listed. Possible duty to disclose true value of property. There also was attempted fraud on the state.
7. The court held that a broker has the highest duty of good faith toward the broker's principal. **This precludes a broker from assuming a position adverse to that of the principal unless the broker has disclosed all the facts in the matter and the principal consents.** The fact that the broker paid a fair price or that the property could not be sold for more money is not material to the agent's liability. **A broker who breaches duty of good faith is not only precluded from recovering compensation for the broker's services, but may be liable for damages.** (Owner also had a right to decide whether the owner wanted the forfeited deposit or a sale, with the broker paying the balance of the deposit.)

8. The court held that the failure to disclose the buyer's intent and that the defendant would profit from relisting the property could have affected the plaintiffs' accepting a lower price. The plaintiffs made a prima facie case of breach of fiduciary duty. **The court also held that there was a basis for determining that the broker had negligently set the selling price too low.** The broker had not researched neighborhood values. (Setting a value unsupported by fact could subject an agent to liability.)
9. The broker was guilty of negligent misrepresentation in advising the plaintiff that Fullmer appeared reliable (no facts to support this) and advising the plaintiff that the security was adequate without making an independent effort to ascertain the actual value of the property. (The broker relied on statements of the buyer.) The broker also should have explained that Fullmer had no obligations under a purchase money deed of trust (no deficiency judgment). The broker was held liable by the broker's negligence for the broker's principal's loss.
10. The court held that a real estate agent is authorized to consent to the entry only of people the agent believes to be potential purchasers. This would plainly exclude the police. The search was improper because the police could not have reasonably believed that the agent had authority to consent to a search.
11. The court held that Clark's negligence caused Foggy to make the loan, and Foggy was entitled to recover all damages proximately caused by Clark's action. Note: The appraisal was made for the purpose of establishing value for a loan, and the appraiser could expect it to be relied upon.
12. While the superior court granted the broker's motion for summary judgment, the Court of Appeals reversed, ruling that the salesperson appeared to be acting as the broker's loan agent and the broker was liable under the "respondeat superior" doctrine. While the defendant may not have known of the alleged fraudulent conduct, the broker was vicariously liable for such conduct if the salesperson committed the fraud while holding himself out as a loan representative of the broker.

UNIT 3: DUTIES AND RESPONSIBILITIES OF LICENSEES

1. For his failure to disclose adverse facts known to him, the jury awarded the buyers \$1,800 in actual damages as well as \$20,000 in punitive damages, which were upheld upon appeal.
2. While the superior court ruled that Marcos had a cause of action for negligence, nuisance, and intentional infliction of emotional distress, the Court of Appeal reversed. The court explained that in order to have a tort, there must be a duty to the injured person. There was no duty to Marcos because Marcos was not a party to the sale. Note: The buyer would be the party who would have the cause of action for broker negligence, not her son.

3. The court held that the board's action unlawfully restrained trade. The board's action affected the public's ability to negotiate for alternative-type listings. (The result has been that some brokers will put homeowners' open-type listings into the multiple listing service for a fee. In these cases, there is no real listing broker. The homeowner will pay whoever sells the property in accordance with an agreement the homeowner works out with the agent.)
4. The court indicated that failure to recommend a title search might constitute negligence because the agent knew the lessors intended to buy and expend funds on the ranch. (Such a recommendation would seem to be proper.) **The statements as to the trust deed were misrepresentations of fact. The agent failed to exercise the skill expected of an agent and should be liable for negligence.**
5. The California Supreme Court held that the broker made a secret profit and was liable to the purchaser for that profit. (The broker's false representations were to the purchaser, not the seller.) The broker was also held for exemplary damages (punitive damages). The broker was held not to be entitled to have the damages reduced by commission the broker paid to others or for the broker's two escrow costs.
6. While the trial court granted summary judgment in favor of the Sutherlands, the Court of Appeals reversed the decision, ruling that the Sutherlands had both a common law and a statutory duty to disclose the disturbances if they amounted to a nuisance. The court pointed out that an action for deceit does not require contractual privity. (It is clear that the Sutherlands expected the misrepresentations to be repeated by the relocation company.)
7. By determining the kind of instrument to be executed the court held that it was the unauthorized practice of law. The court held that if the Broker had only filled in blanks in a form, the action would have only been clerical and not the practice of law. (Apparently, a broker can follow the principal's instructions as to which instrument to use, but recommending another creates the problem of practicing law.)
8. The court held that when brokers and salespeople affirmatively decide to show property, there is a duty of care to warn prospective tenants of concealed dangers. The broker had a duty to warn the tenant of the hidden danger known to both the broker and the saleswoman. (Broker is liable for negligence of the salesperson.)
9. The court held that the mortgage loan broker is retained by the borrower as the borrower's agent. **There was a duty of full and accurate disclosure of material facts that would affect the borrower's decision.** The court further held that there was a duty to call to plaintiff's attention the unfavorable provisions in the loan papers. Evidence was admitted showing misleading television commercials that did not call attention to unfavorable provisions. The court held that the loan broker lured plaintiff into the office by bait-and-switch advertising. The California Supreme Court

held that \$25,000 in compensatory damages and \$200,000 in punitive damages was not excessive. (Alleged that the plaintiff's late charges brought in millions over the years.) The purpose of punitive damages is to punish wrongdoers to deter them in the future.

10. The court determined there was no antitrust violation and the plaintiff had no legal right to use the services of the Board of REALTORS®. While the court agreed that refusal of access to licensed brokers violates the antitrust laws (*Marin County Board v. Polsson*), no trade was infringed upon here because the plaintiff was not in the real estate business. He simply wanted to deal without an agent but have access to the tools of the industry.
11. Carter breached his duty of disclosure. The fact that the buyer is related to the agent is a material fact. The court held that it made no difference that the price paid may have been fair. (A resale for a higher price or evidence that the price was set too low would indicate fraud.)
12. In an action for declaratory relief, the court held that Bernstein had failed to show any anticompetitive effect of the board's rule. A voluntary organization may impose reasonable rules for members' inclusion in the organization.
13. The broker purchaser was held liable because of fraud. **The purchaser was not acting as a pure principal. Because he shared in the commission, he had a fiduciary duty to disclose a higher offer.** This case involved the liability of the Real Estate Recovery Fund. While the fund would not have been liable had a commission not been accepted, the fund was held liable because the purchaser was acting as an agent.
14. A jury awarded Ballou \$138,000 based on splitting all commissions equally between Ballou and Traweck. **Ballou was also awarded \$2 million in punitive damages.** The Court of Appeals upheld the awards because of the material nature of the misrepresentations. The court held that the guaranty to the limited partners could have been taken out of Traweck's share, rather than Ballou's.
15. The court held that a seller has a duty to disclose to potential buyers the existence of a neighborhood nuisance that diminished the value of adjoining residences. "Failure to disclose a negative fact when it can reasonably be said to have a foreseeable depressing effect on the value of property is tortious." (This decision tends to clarify disclosure requirements of CC 1102.6.)
16. The court held that it was not the obligation of the seller to research local land-use ordinances and explain to a buyer the effect of such ordinances on realty.
17. The verbal disclosure was not sufficient, and the court ruled for the plaintiff. The court ruled that the defendant knew of the existence of potential lead-based paint and that written disclosure was required.

18. The superior court granted summary judgment for Cal Fed, FSR, and Grasso. **The Court of Appeal affirmed**, ruling (1) as a foreclosing seller, Cal Fed had no Civil Code 1102.2 duty to provide a seller's disclosure statement to the buyer (as required for most other sellers of California one to four residential units), (2) Cal Fed properly disclosed the recently settled lawsuit for construction defects, and (3) realty broker FSR correctly conducted a visual inspection of the condo, which satisfied the agent's Civil Code 2079 and 2079.3 disclosure duty by reporting the prior construction defect lawsuit, which had been settled. The appellate court commented when the seller and/or agent knows of facts materially affecting the value or desirability of the property, and the buyer does not know those facts, they must be disclosed to the buyer. "The seller or his or her agent must have actual knowledge in order to be liable for failing to disclose a material fact."

The appellate court noted, "We conclude that the fiduciary duty of Sands and Grasso as a dual agent, representing both the buyer and seller, were fulfilled when the buyer was informed that a construction defect lawsuit had been filed and settled. At that point, the buyer should have investigated further and, if necessary, should have hired an attorney for advice on the legal aspects of the lawsuit and settlement. Neither Sands nor Grasso was required to read and analyze the legal documents located in the court file."

19. The Court of Appeal determined that **a real estate broker has a duty to disclose to a buyer that it is a short sale** and that there is a risk that the sale won't close or will close later.
20. The trial court ruled that there is **no liability for failure to disclose unless there is a transaction relationship between the parties**. The Court of Appeal affirmed.

UNIT 4: REGULATION OF LICENSEES

1. The court held that the broker was entitled to compensation if he was licensed at the time the services were performed. The original agreement did not contemplate any further services. If the subsequent lease was in substantial compliance with the broker's contract for commission, the broker would be entitled to commission.
2. The court held that the revocation of Katz's license was not excessive. An "as is" clause and an express disclaimer of warranty did not protect Katz. The court held that these applied only to observable conditions. The court held that a seller is not protected from passive concealment. Katz's offer to rescind without paying for repairs would have been unjust enrichment to Katz.
3. The court held the fund is only liable for an act for which a real estate license is required. It is not required for a co-venture. The court also held the trust involved was not because of an agency trust, where one relies on a broker's representation; the trust in this case was a marital trust of a wife trusting a husband.

4. The court held that recovery is limited to the actual loss suffered, and using the tax benefits as an offset restores the parties to their original condition. (This decision seems to allow the commissioner to readjudicate the judgment amount, as the court determines what the loss is.) The decision of *Acebo v. Real Estate Education and Recovery Fund* (1984) 155 C.A.3d 907 held that the fund need only pay compensatory damages and not punitive damages. The court allowed the fund to look into the nature of the judgment.
5. The court held that Business and Professions Code 10242 prevented loan costs more than actual costs. Pacific Plan's action resulted in some borrowers paying excess costs. The court said that individual accounting was required. The court also stated that using average costs would not be allowed by statute.
6. The court held that the test did not violate the Unruh Act. The court approved economic discrimination where applied evenly to all rental applicants. It affirms right of landlord to apply reasonable income-to-rental requirements. Note: Fannie Mae and Freddie Mac use a 28% of gross income test for maximum housing payments.
7. The court held that the real estate commissioner had failed to make a finding that the conviction was substantially related to the qualifications, functions, or duties of a real estate salesman. Section 475(a) of the Business and Professions Code allows the denial of a license if "the crime is substantially related to the qualifications, functions, or duties of the business or profession for which application is made." Section 10177(b) of the Business and Professions Code is, therefore, limited by Business and Professions Code 475(a).
8. The court held that the extent of participation must be considered. **Attempting to smuggle a large quantity of marijuana involves moral turpitude and demonstrates the lack of honesty and integrity required to be a real estate broker.**
9. The court ordered the reversal of the commissioner's action in denying the broker's license. Section 480 of the Business and Professions Code allows denial of a license for a conviction related to the qualifications of a profession. The court held that no relationship was shown between the conviction and the qualifications to be a broker. (This case takes a very narrow interpretation of the morality required to be a broker.)
10. The court held the policy was discriminatory because it discriminated between children in contemplation over children in existence. The court ruled that it violated a Los Angeles Municipal Code regarding discrimination. (It probably also violates the Unruh and Rumford Acts, as well as the 1988 Amendment to the Civil Rights Act of 1968.)
11. The fund was held liable. The court held that because Kennedy claimed to be acting as a broker, Vinci was within the class of individuals the legislature intended to protect. (If Kennedy were not licensed as a salesperson, the results would likely have been different.)

12. The fund is not liable because the discharge in bankruptcy voided the judgment, and without a judgment, there can be no basis for recovery from the fund. (This is not a very equitable decision and seems at odds with the purpose of the fund.)
13. The court ruled that the town's refusal to rezone to allow multiple family units outside the urban area had a discriminatory effect because the area to be rezoned was 98% white. The decision directed Huntington to remove its restriction of multiple-family units to urban areas and ordered the town to rezone to allow multifamily construction. The court rejected the rationale for the zoning that restricting multifamily units to urban areas would encourage developers to invest in deteriorated and needy sections of the town. This case is important, because it is likely to be cited wherever a developer wants to rezone for higher density if the developer can show the discriminatory impact of single-family zoning.
14. The court pointed out that landlords must make reasonable accommodations in rules to afford people with disabilities the equal opportunity to use and enjoy a dwelling. The Ninth Circuit reversed a trial court that had dismissed the case and remanded it for trial.
15. The court held that the automatic license suspension contained in Business and Professions Code 10475 did not violate due process because the licensee received ample notice and opportunity to challenge the claim that resulted in a judgment. The court pointed out that a formal hearing would not have added significantly to the integrity of the administrative process.
16. The claim was denied in **U.S. District Court and the Court of Appeal affirmed, ruling that Stewart was not an "aggrieved person" eligible to recover.** Stewart Title Guaranty Company was not the defrauded party; the lenders and the borrowers were. By paying off their claims, Stewart did not take over their rights by subrogation. The fund is a limited fund of last resort to protect members of the public who would otherwise have no recourse against unscrupulous real estate professionals. Title insurers were not intended to be "aggrieved parties" as used in Business and Professions Code 10471(a).
17. The district court granted summary judgment for Fox, holding that the studio was not a place of public accommodation so was not covered by ADA. **The Court of Appeals affirmed, because the lot was not open to the public.** Note: A disabled employee might have a claim as to an ADA violation.
18. **The U.S. District Court ruled that the Center's action violated the Americans with Disabilities Act as well as the California Unruh Act and Disabled Person's Act. The U.S. Court of Appeals affirmed,** ruling that the Center must give people with disabilities the "broadest feasible access," including service animals. The Center, as well as employees, was held liable for \$7,000 in total awards to Lentini.

19. The **U.S. District Court granted the preliminary injunction**. Preliminary injunctions can be granted where the plaintiff has a strong likelihood of succeeding on the claims. Note: Apparently, the landlord wished to attract Korean tenants because of a perceived economic advantage. The owner, Donald Sterling, at the time was the owner of the Los Angeles Clippers.
20. A declaratory judgment ruled that FSBO did not need a real estate license. Commissioner regulation was unconstitutional as to free speech in requiring license for internet listing, but not for newspapers (disparity of treatment). Commissioner was unable to show any compelling reason for a license requirement.
21. The Court of Appeal affirmed the revocation, holding there was a relationship between a misdemeanor conviction and qualification, functions and duties of a real estate broker. Note: Property managers of substandard housing, property where funds are not available for corrective action, as well as property in foreclosure or bank owned, should be aware of this decision. If violations are not corrected, the broker's license could be in jeopardy.
22. The Court of Appeal reversed the trial court and ordered the DRE to set aside the suspension. While Civil Code 10177.5 allows the DRE to discipline a broker when there is a civil judgment based on fraud, misrepresentation or deceit, the court determined that the application of the statute violated the California Constitution.

When a party obtains a professional license, it is a protected property right. It cannot be taken away without clear and convincing evidence of disqualification. The jury did not find clear and convincing evidence of fraud.

Analysis: Interactive Participatory Fair Housing Situations

Situation 1: As property manager, you should explain to the owner that Tom Flynn is financially able to rent the unit while also discussing your reasons against the rental.

There is no known derogatory credit information that would preclude a rental.

Tom Flynn has no record of conviction for sex-related crimes or crimes of any sort. While he was subject to serious accusations and there was allegedly significant evidence relating to child molestation, the evidence was inadmissible because it was not obtained with a proper search warrant. The case against Tom Flynn was not prosecuted and Tom Flynn is a free man.

We have the adage "innocent until proven guilty." Tom Flynn was not proven guilty, but I believe he is far from innocent.

We have families with children in the units and children on the playground across the street. Tom Flynn indicated he wishes to live here because he likes to watch children at play. I believe Mr. Flynn is a foreseeable danger to your tenants and the area. Because of the publicity that Mr. Flynn has received, you are likely to lose one or more of your current tenants.

I must inform you that there could be a fair housing violation if you refuse Mr. Flynn's rental application.

A rental refusal would be discrimination against an accusation not proved in court. While not specifically a member of a protected group under federal law, the Civil Rights Act of 1968, as amended, prohibits discrimination by brokers toward clients and customers.

In California, the Unruh Act discloses that all persons are free and equal and discrimination is a violation of the act. The California Omnibus Housing Nondiscrimination Act prohibits discrimination that is arbitrary, even when it is against groups not specifically protected under California law.

While I know of no other situations similar to ours, I don't personally feel that refusal of a rental would be arbitrary or discriminatory. You might wish to consult your attorney on this matter. But if you rent to Mr. Flynn knowing what you know, it could be the basis of a very costly lawsuit if a child is molested by Mr. Flynn.

If you wish to go ahead with a rental, I want it on the record that I advised against it and will not be a party to the rental agreement.

Situation 2: As the owner, explain that you would appreciate a tenant you can relate to, namely a white, senior female. Suggest to the property manager that you could achieve this by contacting local ministers for recommendations as well as advertising bulletins and newsletters of churches that were predominantly Caucasian.

As a rental agent, point out that the qualifications as to age, sex, and color are discriminatory under federal and state laws. Restrictive advertising to achieve those goals would be discriminatory. While you will use your best efforts to find a tenant who had financial stability and a good record as a tenant, you cannot discriminate as to age, sex, or color.

Situation 3: You should explain to the minister that you cannot discriminate as to religious beliefs. While it would be discriminatory to not rent to alcoholics, drug addicts, or smokers, you could achieve your goals by having a prohibition as to alcohol, drug use, or smoking within the unit. In this way, you are not discriminating against people; you are just setting forth prohibited activities within the unit.

Situation 4: A rainbow flag is a symbol of identity as being part of the LGBTQ social movement. To start with prohibiting flying the flag is very likely an Article 1 violation, as it is an exercise of free speech. It stands for gay pride and reflects the diversity of the LGBTQ community.

Besides being protected by the U.S. Constitution, prohibition as to flying the rainbow flag would violate federal and state fair housing laws while considering sexual orientation a protected class. Specifically targeting the rainbow flag is clearly sex discrimination.

UNIT 5: LAW OF CONTRACTS

1. The statement satisfies the statute of frauds. Either party could bring action to enforce the agreement because both have signed it. The maker signed the check on its face, and the payee signed as an endorsement. The property is sufficiently identified, as is the price. The court would imply that cash was to be paid at closing, that closing would be within a reasonable time period, and that the seller would be giving marketable title.
2. The court held that the mistake of a scrivener or draftsman in reducing the intent of the parties to writing is grounds for reformation. The court held that the right of reformation went to subsequent holders.
3. The court held that the telegram was not a sufficient writing to establish an agency. There were no ambiguities to allow oral testimony. Plaintiff was a licensed real estate broker and was presumed to know that contracts for real estate commission are invalid and unenforceable unless they are in writing. The telegram did not satisfy the statute of frauds.
4. The court held that the promise not to sell to one particular person is not an unreasonable restraint on alienation. They also held that \$20,000 was reasonable for liquidated damages (and not a penalty), based upon the emotional distress caused by the breach of the specific promise made by the purchaser.
5. Because the right to purchase was for \$10,000 and the property was sold for \$22,000, the court awarded \$12,000 in compensatory damages plus interest. A preemptive right is a right of first refusal. In this case, it was at an agreed price rather than meeting the price of a future offeror. A right of first refusal really becomes an option when the owner decides to sell. The court held the purchase of the first property was consideration for the preemptive right, so the right holder was entitled to damages when the holder's rights were breached.
6. The court held this was a case of mutual mistake of fact and ordered the return of all monies paid under the lease. Both parties assumed the premises could be used for the purpose rented. Even though "as is" was used, it was not contemplated that this applied to the structural ability of a building to support an activity. (In several cases, the courts have held that "as is" applies to patent or obvious defects, not to latent defects known to the seller or lessor.)
7. The Orange County Superior Court denied Ultimo's motion to compel arbitration, and the Court of Appeal affirmed. The contract was unconscionable in that the customer has no right to be fully compensated for a loss.
8. The court held that a listing for real property must satisfy the statute of frauds. While the statute of frauds does not require the signature to be at the bottom, it must be somewhere in the document. There was no evidence that the defendant intended

to appropriate their letterhead as their signature. While the court determined that the broker was not entitled to a commission for sale of real property, it determined the personal property could be severed from the real property. Because the statute of frauds does not apply to personal property, the court awarded the plaintiff \$30,150 for arranging the sale of the personal property. It was obvious from the decision that the court did not like the result of the application of the statute of frauds and went out of its way to benefit the plaintiff. (The dissenting opinion was that the majority of the court was sanctioning fraud.)

9. The court held that under California Civil Code, a minor under the age of 18 cannot directly or indirectly encumber the minor's property. **Therefore, there could be no valid mechanic's lien against the property.** (Failure to act would indirectly encumber the property.)
10. The court held that this was simply an agreement to agree in the future and that there is no remedy for the breach of such an agreement. A contract requires a complete agreement. In this case, the essential term was left open. The court also held that parol evidence was not admissible to supply the missing agreement. (There wasn't an ambiguity.)
11. The Ninth Circuit Court affirmed an \$18.5 million verdict in favor of the plaintiffs. An oral agreement to lend money to purchase property does not come within the statute of frauds (Civil Code 1624), although the statute of frauds does apply to an oral promise to grant a lien against real property.
12. While the trial court held that the parents had a legal duty to read the trust deed they signed, the Court of Appeals held that, like the famous Peerless case (*Raffles v. Wickelhaus* (1624) 159 Eng. Rep 375), **the parties had made a fundamental mutual mistake, so no agreement was made. Rescission was therefore proper.** Note: The lender lost the security for the loan.
13. The court held that while the buyer offered the clause, the seller did not accept it. All parties must agree to the clause for it to be effective. Note: The acceptance really was a counteroffer, because it was not in accordance with the offer.
14. The court pointed out that there is a marital duty to support (Civil Code 5100 and 5132). **The agreement of the wife to support the husband did not constitute any new consideration to support an alleged indebtedness.**
15. The Court of Appeal reversed the award for lost profits because the evidence at trial was speculative. The court held that lost profits could be compensable, but there must be reasonable certainty of the profits.
16. The trial court ruled the emails, text, and voicemail showed a meeting of the minds to constitute a settlement agreement.

The Court of Appeal reversed the ruling that an electronic signature only applies under the Uniform Electronic Transactions Act in which the parties consent to conduct the transaction by electronic means. The evidence was not sufficient to conclude that the printed name at the end of an electronic message was an electronic signature.

Note: Electronic acceptances must be clear that the intent of the sender is that the printed name be an electronic signature.

UNIT 6: REAL ESTATE CONTRACTS

1. The listing was held to be properly canceled for cause. For an exclusive listing that is irrevocable for a stated period, consideration is required. The consideration is the promise to make diligent effort to find a buyer. The court held that the acceptance of an offer to pay for services to be performed would obligate the agent to due diligence even if it were not expressly stated. In this case, the broker indicated that they advertised the property with other property. The court felt it was a token effort. The right to rescind was based on the partial failure of consideration. (For broker protection, files should indicate all efforts made under a listing in order to prove wrongful revocation. If a listing is wrongfully revoked, the agent would be entitled to a commission.)
2. The court held that the broker was not entitled to a commission. She did not produce a buyer, because she never put the owner in a position where he could have made a contract had he so desired. The letter was not an offer; it only informed the owner of an offer. If the broker had delivered a proper offer to turn into a contract by acceptance, then the broker would have performed. The court also held in this case that the duty of an agent to communicate an offer to the principal is the same whether the offer is written or oral.
3. Rose was entitled to a commission. In the absence of an exclusive right-to-sell listing (this was an open listing), a broker must be the procuring cause to be entitled to a commission.

“Procuring cause is the cause originating a series of events that, without break in their continuity, result in the accomplishment of the prime object of employment. Procure does not necessarily imply the formal consummation of an agreement; the word in its broadest sense means to prevail upon, induce or persuade a person to do something.”

Ordinarily the price at which a broker is authorized to sell property is considered merely an asking price to guide negotiations. If the broker “procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of his commission by conducting the final negotiations himself and selling at a lower price to the purchaser procured by the broker.” “If the broker is in fact the procuring cause of a sale,

it is unnecessary for him to prove that he was the first one to bring the purchaser's attention to the fact that the property in question was for sale."

4. The court held that while agreements with owners must be in writing, the legislature did not intend to extend this requirement to others. The court noted that agreements between brokers and brokers and salespeople need not be in writing. (A finder's fee agreement does not involve real estate, it involves people. All the finder is providing is an introduction.)
5. The broker was held to be entitled to a commission. While there is no estoppel from the statute of frauds for a mere oral promise to pay a commission or a promise to sign a listing, this is not the case here. The seller's agent (attorney) indicated that a listing was actually in existence. The court held that the broker reasonably relied on the representation of the seller's attorney. The seller was held to be estopped from raising the defense of the statute of frauds.
6. The court held that the broker's right to the commission was not affected by the failure of either party to carry out the sale. In this case, the court awarded the plaintiff the entire \$8,250 commission. The court held that the broker's right to compensation was not dependent on escrow instructions where the broker did not consent to them. The court also held that the deposit receipt was a binding contract. (The defendant had chosen to sue for damages on the breach of contract rather than declare a forfeiture of the deposit.)
7. The court held that the trial court was justified in determining the broker had produced a buyer ready, willing, and financially able. The court held that the trial court was justified in determining that the buyer was able to purchase within the terms set forth in the listing agreement. The court cited *California Land Security Company v. Ritchie* 40 C.A. 246. This case held that if any of the terms are unsatisfactory to the vendor, the vendor should object to them on those grounds and not absolutely refuse to sell. Where he refuses to accept the purchaser, he should be held liable for the commission.
8. The court held that the broker was entitled to a commission. The court held that the fact that no offers were received did not require a finding that the broker had failed to use diligence that would have been cause for withdrawal. The defense was raised that the commission was a penalty for withdrawal and unenforceable. The court held that a claim for compensation under the withdrawal clause is not a claim for damages, but indebtedness under the contractual agreement. The minority opinion felt the court had sidestepped the issue of whether the commission for withdrawal was damages or liquidated damages. The minority opinion indicated the court could not justify the full commission (on list price) as liquidated damages because damages must be assessed reasonably. (This could be an interesting issue in the future.)
9. The court held that a finder who only brings parties together need not be licensed. The court found for the plaintiff. The defendant claimed that Section 10131(d) of

the Business and Professions Code requires anyone who solicits lenders for a loan secured by real estate to be licensed. While the statute seems to require licensing for soliciting lenders, the court held that this was not the legislative intent. Licensing requires knowledge of arithmetic and law. Such knowledge is not needed for a finder. The plaintiff did not participate in the loan negotiations.

10. Section 2076 of the Code of Civil Procedures holds that one who does not object to a tender waives the right to object. **Therefore, the broker was not entitled to any further consideration.** This case is important in that it allows oral modification of written listings. (The court could have applied the doctrine of estoppel. The owners were not obligated to clear the title, but they acted to their detriment based on the verbal promise of the broker.)
11. The court held that using “as is” in the escrow contract did not relieve the broker from his prior fraudulent representation. **The court held the seller liable also because the seller gave the broker the power he misused.** The seller is liable even though innocent of any wrong when he accepts and retains the benefits of the transaction.
12. The court held that a deposit belongs to the principal and cannot be returned without the principal’s consent. The broker breached an agency duty. The court also held that satisfaction to one party ordinarily means satisfaction to a reasonable person. Satisfaction as to commercial value or quality, fitness, et cetera cannot be denied arbitrarily or unreasonably.
13. The builder was not required to pay the commission. The requirement that a commission be paid was an illegal tie-in arrangement that violated both state and federal antitrust laws. The builder was not required to pay.
14. The court held that the broker did not need a second writing to support the claim for commission. Because the original sale agreement was replaced by a new agreement between the same parties, with the broker’s help, the original commission agreement should be applicable to the final sale.
15. The broker was entitled to a commission. The court held in this Arkansas appellate case that title transfer to the builder, then to the buyer, was simply an attempt to avoid a commission. The former owner was really selling to the buyers, who were located by the agent during the term of the listing.
16. The court awarded the broker the commission he would have received had the sale been completed (\$100,000 minus seller’s agent’s share). The court pointed out that although it is generally the seller’s responsibility to pay the commission, in certain circumstances the broker can recover from a buyer. If the broker is retained by the buyer, locates property for the buyer, and the buyer agrees to buy at the price offered, the buyer promises to complete the transaction so the broker can recover his commission. If the buyer defaults, the broker can recover the full commission from the

buyer based upon the breach of the implied promise. (The broker was a third-party beneficiary of the purchase agreement.) Note: This case points out the advantage of being a buyer's agent, because a buyer's agent is apparently not limited to a share of the liquidated damages when the buyer defaults.

UNIT 7: PROPERTY, ESTATES, AND RECORDING

1. Adaptability and intent make the *Queen Mary* real property. The fact that it can be moved doesn't change its nature. The vessel housed a museum, hotel, shops, and restaurants. It was developed as a permanent tourist attraction. While it was capable of being moved, it was connected by service lines and permanent gangways. Its movement was minimal. In addition, great expense was involved in the removal of equipment, indicating the intended permanence.
2. The court held that an inadvertent error cannot alter an intended relationship, so the trust deed recorded second was given priority. The Supreme Court, in making its decision, emphasized the holders of the trust deed intended to be second and had actual knowledge of the other trust deed, which was to have been recorded first. The court pointed out that this party's position would not be hurt because they intended to have a second trust deed. (It is doubtful whether the decision would be the same if the holders of the first recorded trust deed were assignees that, from the recording, assumed they were purchasing a first trust deed.)
3. It was not constructive notice to the beverage firm. Constructive notice of a mortgage recording only applies to subsequent purchasers and mortgages and not to others doing business with the corporation.
4. The recording did not give constructive notice. The party executing was required to be known by and acknowledge his or her signature or sign in the presence of the notary. In the absence of either, there was no constructive notice.
5. The court held that the deed was a valid conveyance in granting a remainder interest. The deed created a life estate in the grantor.
6. The date discrepancy did not invalidate the acknowledgment. This was a Ninth Circuit Court case. The Court of Appeals held there was substantial compliance with the statutes as to acknowledgment. The mortgagees were still secured creditors.

UNIT 8: OWNERSHIP OF REAL PROPERTY

1. A joint tenancy was created in the life estate. The life tenants have survivorship rights with the last survivor having sole rights to occupancy. Upon the death of the first life tenant, the remainder interest holder does not get the first life tenant's occupancy right.

2. “Since each co-tenant has a right to occupy the whole of the property, the possession of one is deemed the possession of all and each may assume that another in exclusive possession is possessing for all and not adversely to the others...” One co-tenant “does not gain title by adverse possession against the others unless notice is brought home to the others that such possession has become hostile.”
3. The parties are joint tenants and the former wife has survivorship rights. A continued right of equal possession is not required to maintain a joint tenancy. The parties did not terminate the joint tenancy and right of survivorship. (In cases of marriage dissolution, joint tenancy interest in a single-family residence would be considered community property [CC5104]. This is a presumption only and can be overcome by evidence to the contrary. It is clear in this case by the life possession and prohibition against transfer that survivorship was intended. If the courts had treated the property as community property upon dissolution of the marriage, continued joint ownership would have been as tenants in common.)
4. **The U.S. District Court held that the United States was immune from liability because of the recreational user liability in Civil Code Section 846.** The landowner (United States) owes no duty to keep land safe for recreational users. The Ninth Circuit asked the California Supreme Court to decide whether Section 846 exempts a landlord from liability for an employee’s acts of vehicular negligence within the course and scope of employment. The California Supreme Court determined that Section 846 immunized landowners from liability as to recreational user as to the conditions of the property; however, the landowner is not immune from injuries from negligent active conduct.
5. The action of the corporation was improper, and it could not assess the owners for costs. The assessment was not for expenses incident to the enforcement of restrictions. No ambiguity existed as to the restrictions. The restrictions applied to the project and those covered by it, not to control nuisances elsewhere. Note: Because the corporation engaged in an ultra vires act (an act beyond their authority), the individual directors who authorized the expenditures could be held liable. Many homeowners associations carry director liability insurance to protect the directors.
6. The Sacramento Superior Court jury awarded the limited partners \$165,527.73 actual compensatory damages plus \$7 million in punitive damages. The Court of Appeal affirmed the compensatory damages but reduced the 42-to-1 ratio of punitive damages to actual damages to 9-to-1 ratio based on a 2003 U.S. Supreme Court case, which held that punitive damages that exceed nine times compensatory damages are excessive (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408). The managing partner had been sued by his partners who alleged breach of fiduciary duty, interference with economic advantage, misrepresentation, fraud, and breach of contract.

Note: The court agreed with the trial jury that Oates’s conduct breached his fiduciary duty to his limited partners. “The jury could find that the kickbacks, markups,

and concealed commission(s) were part of a systematic pattern of Oates of bilking his partners.” Nevertheless, the court was required to reduce the punitive damages to \$1.5 million to reflect the 9-to-1 ratio, despite the fact that the sum is insignificant considering Oates’s net worth of at least \$600 million.

7. While the trial court had ordered a sale, the Court of Appeal held that the trial court abused its discretion in ordering a property sale rather than a partition in kind. The reason the plaintiff wanted a sale rather than a partition in kind was that he wanted the entire parcel. In order to have a sale, the plaintiff must show that either
 - physical division into equal value parcels is not possible or
 - a division of the land would substantially diminish its value. (The whole would be worth more than the sum of its parts.)

The court held that neither reason was present, and it should not force a sale upon a cotenant who does not want loss of use of property or the tax liability that would result from a sale. The court held the trial court abused its discretion in ordering a property sale rather than a partition in kind.

8. The court held that an owner is not liable to a trespasser for injuries from dangerous conditions unknown. They held that the owner had no duty to inspect the fence for holes, and even if he had known of the vats of acid, he would not be liable because they were not dangerous to people behaving properly.
9. While they took title in joint tenancy, the court held that they had actually taken title as tenants in common. The court held that title could not be in joint tenancy because joint tenancy requires equal ownership of every owner. (The woman owned one-half and the husband and wife owned the other one-half.) One joint tenant cannot have a greater interest than the others.
10. The court held that all the husband had encumbered was his undivided interest. **The purchaser at the foreclosure sale became a tenant in common with the wife.**
11. The court held that a landlord not in possession or control of the premises was not liable for the injury. It should be noted that in this case the fact that the landlord was in the process of evicting the tenant might have influenced the decision because the landlord could do nothing else to get the tenant out. If the landlord leased the premises for a use that could be anticipated as dangerous to others, then the fact that the landlord was not in control or possession would be unlikely to shield the landlord from liability.
12. The court held that the school had no duty to light up public walks and streets so students could view dangers. Without any duty, there is no negligence for failure to provide lighting.
13. The court held that the evidence was such that a jury could conclude defendants’ control over the vacant lot was sufficient to charge them with a duty of care. This

case differs from other off-premises injury cases in that the defendant had a right to use the off-premise site and had benefited by the use and had exercised control over it.

14. The agreement to sell was null and void, and the buyer had no relief against the community property. There can be a sale or partition of community property only if both spouses consent to it. Any agreement made by one spouse can be entirely set aside by the other spouse.
15. The court held that the landlord was immune, citing CC846, which states that an owner of any estate in real estate has no duty of care to recreational users. The court, however, did not see fit to extend this immunity to the other defendants. Being contractors, they had permission to enter the property to perform their work. The court indicated that they were not agents of the owner and were denied the protection of CC846.
16. The subsequent mortgage payments, made with community property funds, created an after-acquired interest that was not transferred by the prior quitclaim deed, so the wife was entitled to her portion of this interest (increase of value after the quitclaim deed). The wife had previously conveyed the entire community property interest by quitclaim deed. The deed was given for value without fraud.
17. The California Supreme Court held that the grazing permit gave the defendant an interest in the land that is protected by Civil Code 846 regarding liability from injuries to recreational users. Note: This case differs from *New v. Consolidated Rock Prods.* in that the court did not find that the defendant had acted willfully or in conscious disregard of a duty to warn the plaintiff.
18. The court held that the landlord's duty as to the sidewalk created by municipal ordinance was to the city, not to the pedestrian. The landlord was held not to be liable to the injured pedestrian.
19. The court held that recreational immunity did not apply because the Curry Company made claims in its brochure stating that the trail was safe for cycling and its bikes were safe for cycling on the trail.
20. The court held that the landlord had no duty to protect the trespassers from their own activities (a candle was used for illumination).
21. The court held that while the wife was entitled to the \$40,000 contribution to the community property, the \$13,000 saved benefited the community property rather than just the wife.
22. The court held that there was no landlord negligence. The only negligence concerned the tenant. (She was playing without adult supervision, and the bed was placed by the window.)

23. The superior court ruled that the partnership was dissolved and found there was no constructive fraud. The Court of Appeals affirmed, ruling that while partners have a fiduciary duty to each other, there was no violation in this case. Partners could bid at a foreclosure sale to avoid losing their half of the property. Note: This couple that purchased at the trustee's sale had put up the down payment. The other couple was to have made the payments, but they defaulted.
24. The court ruled that there was no duty of a homeowner to supervise a child in the vicinity of a residential swimming pool when the child's parent is present. Padilla had claimed there was a joint parental duty of supervision. Note: It appears as though this case was brought to reach the deep pockets of the homeowner's insurer.
25. The trial court found the farm owner to be 35% negligent and awarded the plaintiff \$1,637,226 damages. The Court of Appeal reversed, ruling that the farm owner had no duty to protect the injured worker from the negligence of the truck driver. The court noted that the greater the likelihood of injury, the greater the duty to protect members of the public. There was no reasonable foreseeability of harm because it could not be foreseen that members of the public would be driving on the private road at excessive speed.
26. The trial court ordered foreclosure, but the Superior Court Appellate Division ruled that the partial payment should have been accepted so the amount owing would be less than \$1,800, so foreclosure was inappropriate.
27. While the trial jury awarded \$1,336,397 in damages, the trial judge set aside the verdict, ruling the sidewalk defect was trivial. The Court of Appeal affirmed, ruling that a property owner is not negligent for failure to repair a trivial defect.
28. Generally, members of an LLC are not liable for the obligations of the LLC. However, LLCs may not distribute funds to members without reserving sufficient assets to pay liabilities. The members were held jointly and severally liable. To rule otherwise would allow LLCs to avoid debt by distributing assets and dissolving the LLC.
29. The trial court judgment was for the defendant to remedy the unauthorized modification of flooring so as to reduce the noise transmission to the unit below. The court was not ordering removal of the hardwood flooring, but that a compromise be found to remedy the problem (such as throw rugs).

The Court of Appeal ruled the defendant's violation of the HOA rules resulted in a "great nuisance" and the injunction was upheld.

30. The court pointed out that the burden of protecting the plaintiff would be onerous. The burden outweighed benefits. The court's refusal to allow the plaintiff damages is consistent with the rule that landlords have no duty to protect visitors outside the premises.

UNIT 9: ACQUISITIONS AND CONVEYANCES

1. If the life estate was based on the life of a person other than the life tenant, then the life tenant's interest can be transferred by will.
2. Grantor retained title because inadequate description of the life estate interest rendered the deed void.
3. The court held that because the grantor purported to convey a fee interest, the after-acquired interest passed to the grantee.
4. There was a present transfer, so the deed was valid. (Deed could have been recorded.)
5. There was no transfer of title. The court determined that it was clear that delivery was not intended.
6. The court held that the barges were peculiarly adapted to the condemnee's business and could be considered fixtures. **Because prohibiting of commercial use of the lake was a taking, the barge owners were entitled to compensation.**
7. The court held that the proper measure necessary under the Fifth Amendment is fair market value when that value can be ascertained (not replacement value). In this case, there were 11 recent camp sales for comparables.
8. The loss was compensable. If the business suffered a loss because it moved farther away to a less expensive rental, the loss would be compensable as a loss in goodwill. (Code of Civil Procedure 1263.510.)

By staying in the area, the corporation had to pay higher rent (the rent was not shown to be unreasonable). The court held that it would be arbitrary to award compensation in one case and not the other. (Keep in mind that a corporation is a separate legal entity.)

9. An altered deed in escrow conveys no title because an unauthorized alteration makes it a forged deed. Because no title passed, the plaintiffs are entitled to recover the property. Escrow, though at fault, isn't liable for property not intended to be conveyed, because it was not conveyed.
10. The court held that compensation is not limited to real property and the owner was entitled to just compensation for taking of her property as a constitutional right. Compensable losses in eminent domain do not ordinarily include compensation for personal property, because personal property can be moved. This was not the case here. (There were about 400 cars, which if relocated would be worth approximately \$300,000, but were worth only \$50,000 as they sat.)
11. While the conveyance was not void, it only transferred one-half of the property. It severed the joint tenancy; however, the forged signature transferred nothing.

12. The court held that a resulting trust arises when title is taken by one person but consideration is paid by another. The son tried to defend, claiming any agreement to purchase for his parents would have been an illegal contract and, therefore, void and unenforceable. The court held he was primarily at fault and to apply the *pari delicto* rule would unjustly enrich him. (Parties who are equally at fault may not recover under an illegal contract.)
13. The court ruled the sale did not cause ademption (revocation or failure of a specific legacy in a will by disposal of the asset before death). **Because the decedent owned the asset at the time of death, the specific legacy would stand.** If the sale had been closed before death, the proceeds would likely go to the residual beneficiary, which in this case was a charity.
14. The court held that to comply with the restrictions in the deed by which the property was dedicated to the city, a proposed use must directly contribute to library purposes. In this case, the use would actually destroy part of the existing library and might have a negative effect on the use as a library.
15. Co-owner 2 had moved for a summary judgment which was denied by the trial judge. The Court of Appeal reversed, ordering the trial judge to enter judgment in favor of co-owner 2. Co-owner 1 had not proved ouster, so the tenancy in common remained. Any tenant in common has the right to occupy the whole, and exclusive occupancy is not adverse. To prevail, co-owner 1 would have had to oust co-owner 2 by refusing entry.
16. The trial court agreed, granting the claimant title to the disputed land. The Court of Appeal affirmed because payment of taxes is excused when taxes are not assessed or levied.
17. The trial court ruled in favor of the city.

The Court of Appeal reversed the ruling that restriction on one-third of the site was a *de facto* taking. The city cannot use development restrictions to land bank property for later taking based on an undeveloped price.

UNIT 10: REAL PROPERTY SECURITY DEVICES

1. While the mortgagee can obtain a deficiency judgment against the husband, the mortgagee has lost all rights in the property. (In this case, the mortgagee apparently bid less than the value of the property to try for a greater deficiency amount and was hoisted on his own petard.) The grant deed from the husband after the foreclosure sale transferred only the husband's right of redemption. The redemption by the wife was free of the creditors' deficiency claim because the redemption was by a person other than the judgment creditor. A mortgagee who underbids does so at the mortgagee's own peril. In this case, the property was the separate property of the husband.

2. When the grantor of the trust deed gave the trust deed, she warranted that she had title. **She cannot now claim defense of a first trust deed foreclosure that would be a denial of her title.** The court held that she was estopped from raising the foreclosure as a defense. The lien that was wiped out by a prior lien foreclosure was revitalized by a subsequent purchase. The Civil Code provides subsequently acquired property inures to the mortgagee (beneficiary). The court held that the code applied.
3. The court held that the assignment to the mortgagor of the mortgagor's note and mortgage extinguished the mortgage by merger. **A subsequent assignment could not revive a mortgage that no longer was in existence, so it could not be foreclosed.** The results allow the mortgagor to profit by the improper assignment. Perhaps the plaintiff should have brought action in equity for the return of the consideration or in reformation to get the proper mortgage and note for which he had bargained.
4. Foreclosure on the purchase money trust deed eliminated the lien as to the second trust deed, as well as the subsequent loan by the first trust deed beneficiary. (The additional loan was not a purchase money loan, so the trustor could be held personally obligated for the advance.)
5. In this case, Miller and several strawmen were convicted of defrauding federally insured lenders. The strawmen represented that they were purchasing the property for a high price, had paid a down payment, and intended to live on the property. While this was a federal case, the defendant could likely have been held liable under state law because he apparently took unconscionable advantage of owners in default.
6. The court held that a late-charge percentage that is a percentage of the unpaid balance is punitive and invalid and is not liquidated damages. Late charges are customarily liquidated damages amounts agreed to in advance as reasonable damages for paying late. In this case, the defendant failed to make a reasonable endeavor to estimate fair compensation. The court indicated that a late charge calculated as a percentage of a delinquent installment might be treated differently.
7. The court will not allow the remedy of specific performance where consideration is not just and reasonable. The contract for sale was not just and reasonable because the subordination clause gave the sellers no security other than the purchaser's good faith.
8. The estate, not the mortgagee, is entitled to the proceeds from crops. If the mortgage does not provide that the mortgagee has rights in rent or crops, then the mortgagee has no rights before foreclosure (no assignment of rights to rents or crops in the event of foreclosure).
9. Calling a loan a sale with an option to repurchase does not protect the transaction from the usury laws.

10. The court held that the usury exemption did not apply, because the loan to the broker was not “made or arranged by a broker” in the conventional sense.
11. The court determined that because statutory procedures were followed, the sale is presumed to be valid and there were no grounds for attacking the validity of the sale. (Value was estimated at four times the sale price.)
12. The defendant was not liable. The court held that this unilateral mistake by Cal Fed did not result in unjust enrichment. The borrowers had no knowledge of Cal Fed’s mistake. If Cal Fed had not agreed to waive the prepayment penalty, the refinancing would not have taken place. The court held that recovery by Cal Fed would not be equitable.
13. While the San Diego County Superior Court ruled that California’s anti-deficiency judgment statute barred a deficiency judgment, because it was a purchase money loan, the Court of Appeal reversed, holding that CCP580b does not apply because this was not a purchase money mortgage (this was a lien on a property owned for three years before giving the lien).
14. The trial court awarded the bank \$358,000 in property taxes and \$8,333,333.33 in punitive damages. **The Court of Appeal affirmed the award.** It held that the borrower’s failure to pay real estate taxes constituted bad-faith waste, justifying the punitive damages. The court noted that the owners had received \$1.7 million from the property while the taxes remained delinquent. They pointed out that failure to pay taxes on a nonrecourse loan is a form of “milking” the property.
15. The court ruled a clerical error setting the minimum bid is not grounds to set a sale aside. A properly conducted sale is a final adjudication of rights of the borrower and a lender. Inadequacy is not sufficient to set aside a sale. Note: The loan servicer would be liable for \$90,000 in negligence damages.
16. The lender intended to return the check to the insurer; however, the buyer at the sheriff’s sale claimed entitlement to the insurance proceeds to cover the property damage. **The trial court ruled that the insurance proceeds should be returned to the insurer, saying there was no privity of contract between the buyer and the insurer and so the buyer had no claim as to insurance proceeds. The Court of Appeal affirmed,** pointing out that a fire insurance policy does not run with the property. Note: By delaying paying a claim on a property in foreclosure, the insurer could be relieved of obligation of the sale proceeds payoff.
17. The holder of a second trust deed that is wiped out by a foreclosure of a first trust deed is entitled to a judgment for loan balance and interest due. **While the first trust deed holder is not entitled to a deficiency judgment, the holder of the second was not barred.**

18. The defendant prevailed because the **homeowner failed to establish an essential element of promissory estopped, which was damages**. The homeowner could not show damages because there was no shown equity in the home.

UNIT 11: INVOLUNTARY LIENS AND HOMESTEADS

1. The building corporation hoped to assert its mechanics' liens against the property to defeat junior encumbrances (they had given trust deeds to a lender who was now foreclosing). **The court held that a person who otherwise would have a mechanic's lien would lose it if it were against its alter ego**. Because the lumber company and building corporation were the same entity, they could have no lien against themselves and could not foreclose.
2. The property was protected against mechanics' liens by the notice of nonresponsibility. If an owner compels a tenant to make improvements to enhance the value of the premises, the lessor is considered a participant in lessee's contracts, and mechanics' liens would attach to the property even if the lessor filed a notice of nonresponsibility. In this case, alterations were not contemplated at the time the lease was signed, and the owner specifically declined to participate in the expenses.
3. The broker is entitled to foreclose on his mechanic's lien. There is no requirement that the provider of equipment be the owner of that equipment.
4. Action to foreclose a mechanic's lien should not depend on the amount of money secured by that lien. In this case, the action was to foreclose a \$97.50 mechanic's lien. The court found that the true amount due was \$60, and the defendant had made a proper tender to pay \$60. Court also held that an unintentional excessive claim did not invalidate the mechanic's lien. Note: Refusal of proper tender would, however, cause the lien to be lost.
5. Yes, in order to be protected against a lien, a notice of nonresponsibility must have been filed.
6. The attachment did not give the creditor priority over the declaration of homestead. The statute (Civil Code 1241) provides that homesteads do not take priority over prior recorded encumbrances. The previous statute had used the word "mortgages." The court held that the word "encumbrances" as used meant mortgages and trust deeds.
7. The contractor had no right to a lien unless he had either completed the contract or the completion had been waived or excused. Courts in later cases have held that minor irregularities do not defeat lien rights; they could, however, affect the amount of the claim.
8. The court allowed the trustee in bankruptcy to set aside the conveyance as a fraud on the creditors. If the bankrupt owner had not conveyed the property, she would

have been protected up to the amount of her homestead exemption. In this case, the court held that her conveyance to her daughter was an abandonment of her homestead rights, and her homestead was lost. (This California case was tried in federal court because it involved the trustee in bankruptcy.)

9. Court held that absence from the state tolled the statute of limitations. **Execution of the judgment was allowed.** The court also held that a court could allow execution of a judgment after 10 years if the creditor exercised due care to collect within the 10-year period and was reasonable in concluding that execution was wasteful.
10. No, the court held that placing markers and stakes were devices to assist the engineering company in preparing its plans, and it was not the start of site improvements.
11. The Court of Appeal affirmed. While it results in an unfair result, the court felt that public policy demands that unlicensed contractors not be paid for material or services.
12. The trial court ruled that the contractor was not licensed to do business under the contract name so was not entitled to enforce a mechanic's lien. The Court of Appeal reversed ruling that failure to sign an exact name was not a legal bar to bring action. The license was issued to an individual. The individual was licensed. Note: This is a case of loophole searching. The purpose of the law is to protect against unlicensed contractors and the contractor was licensed. A minor drafting error does not change this fact.

UNIT 12: ADJACENT PROPERTY RIGHTS

1. The servient tenement may designate a suitable route. Where the servient tenement fails to do so, the owner of the dominant tenement may designate it. (If the parties cannot agree on the location of an easement, a court of equity will, in an appropriate action, locate the easement.)
2. The Court of Appeals held that if the lease did not authorize the disposal of hazardous waste on the property, a trespass action was proper. **A nuisance can be a direct injury to the plaintiff's land, as well as injury caused to adjacent land.** The defendant could be held liable even though he was no longer in possession. As to trespass, the lease did not give the tenant unrestricted possession of the property. Because both the trespass and the nuisance were of a continuing nature, they were not barred by the statute of limitations. The Supreme Court denied review, so the decision stands.
3. Note: A decision in favor of Khosla would negate much of California's beach access regulation. The U.S. Supreme Court need not grant review. The state also could consider eminent domain.
4. The statement in the easement was held not to be an agreement to rebuild.

5. Trees that sit on the boundary line and form the boundary are owned by the owners as tenants in common. **Neither owner is at liberty to cut them down.** Cutting the trees for firewood is not a legitimate enjoyment by a tenant in common.
6. In the absence of a statute or ordinance, an owner owes no duty to the neighbors to prevent seeds from naturally growing weeds on the owner's land from maturing and being blown by wind onto the neighbor's land.
7. The court held that a possessor is liable for ordinary care in managing her property and must act on dangerous, artificial, and natural conditions. (Ownership of hillside property can now carry with it extensive financial liability.) The defendant claimed no liability under the common law rule that a landowner is not liable for injuries caused by the natural conditions of the property. The trial court agreed. The California Supreme Court changed the common law rule and held that a landowner is no longer immune from losses suffered because of the natural conditions of the property.
8. The court held that an upper landowner who collects surface water and discharges the water into a natural watercourse is not liable to the lower landowner for damages resulting from increased volume. (This decision seems to agree with the reasonable use doctrine of *Keys v. Romley*.)
9. The court held that the use for the period of time without landowner interference is presumptive evidence of an easement by prescription. In this case, Bel Air formerly owned the land, and it was a case of a grantor getting prescriptive easement rights against a grantee.
10. The court determined that, in this case, the plaintiff had a prescriptive easement. While definite routes must be established to create an easement by prescription, slight deviations are permitted.
11. Treating the ditch with gunite was held to be beyond the easement holder's right to repair. **It enlarged the easement by altering the easement use.** The servient owner was entitled to the benefits running with the easement, including the vegetation that flourished from the easement use. The court held that the scope of the easement is fixed by the location, character, and use in existence at the time the land became subject to the easement.
12. The English doctrine of "Ancient Lights" does not apply to this country. A property owner does not have the right to prevent his neighbor from building as he sees fit on his own land, provided it is not a nuisance.
13. The court held that this was a permanent nuisance/trespass, and the statute of limitations began at the time of original entry and had expired (CCP 338(b)).

14. The Court of Appeals dismissed the case on the grounds of insufficient personal injury in the absence of proof that electrical and magnetic fields cause harm. The Supreme Court pointed out that the Public Utilities Commission (PUC) has exclusive jurisdiction, so homeowners cannot bring private nuisance or negligent actions against utilities. Note: The homeowner is apparently without recourse if high-capacity transmission lines are placed on existing easements adjacent to the homeowner's property even though it would negatively affect value and possibly pose a threat to health.
15. The wall may remain. The court indicated that even though the oral agreement lacked the requirements of an easement, it was at least a license. When a party has made substantial expenditures in reliance on the license, the license acts as an easement, and the grantor and the grantor's successors are estopped from revoking it.
16. The Court of Appeal upheld Quinone's right to remove the cacti but held that Quinone must pay the plaintiff's costs that were precipitated by the trespass. Tremper had sued for quiet title, trespass, nuisance, and destruction of trees, declaratory relief, and a preliminary and permanent injunction. Quinone cross-complained for quiet title based on the doctrine of agreed boundaries and for relief as a good faith improver. The superior court denied relief under agreed boundaries (the true boundary was ascertainable) but found that Quinone was a good-faith improver of his neighbor's land and had the legal right to remove the cacti.
17. The court expanded the easement right to use the land of another to the taking of water by prescriptive use.
18. The Court of Appeal reversed the trial court, explaining that because the party intended to build their home where they did, it was no accident even though they were mistaken as to their ownership of the land.
19. The city demurred (dismissed as no remedy under the law).

The trial court sustained the demurrer. The Court of Appeal agreed. It held that loss of view was not an intrusion. Under California law, there is no right to an unobstructed view.

20. The trial court ruled for the homeowners, which was affirmed by the Appellate Court. The DFW had strict liability because it intentionally reduced flood protection in favor of protecting environmental resources.

UNIT 13: LAND-USE CONTROLS

1. The owner was entitled to compensation for the taking of his property. The court held that rezoning was the improper use of police power. It was the substitution of police power when eminent domain should have been used. (The action might have been proper if the rezoning was warranted under police power. In this case, the court determined that the purpose of rezoning was to gain public use without compensation.)
2. The court held that downzoning is neither invalid nor is it inverse condemnation. It is a proper regulation of land use. The court also pointed out that an aggrieved party must exhaust the administrative remedies provided before the party can resort to the courts.
3. For the court to set aside the zoning, it must clearly be arbitrary, which was not the case in this instance. The validity of zoning is not whether a judge would have made a different decision if the judge had the power to decide on the policies. The court held that aesthetics are relevant to zoning.
4. Adaptability and suitability of property for business use is not the controlling factor in determining the validity of a zoning ordinance. The fact that prior zoning granted exceptions in similar cases does not give an owner a vested right to an exception. A city placing a time limit commensurate with the investment involved, its character, age, and other relevant factors for removal, is not a taking of property. Damages suffered by loss in value by exercise of police power is merely one of the prices individuals must pay as members of society.
5. This is a case of changed conditions. **The court held it would be oppressive and inequitable to give effect to the covenant.** Enforcement would not have an effect other than to injure or harass the owners without affecting the purpose for which it was intended.
6. The court held that a plan to contain an operation looking forward to the entire elimination of a nonconforming use was a recognized zoning objective. (Nonconforming use does not have a vested right to expand scope of operations.)
7. Requiring dedication for development is a reasonable exercise of police power. A general plan showing street extension was not a taking of property.
8. Although the trial court held that zoning was arbitrary and the city was also estopped from rezoning, the Court of Appeal held that because the city had a basis for rezoning, it was not arbitrary. **They held that the public good was greater than an individual injustice.** The court also stated that the city had never promised how long they would keep the zoning. (While this case upholds the power of zoning, in its application it arrives at a result that does not appear equitable.)

9. Because Krater's plan provided for continued housing for the special classes of tenants until relocation was possible, the city was not justified in refusing the conversion. The ordinance did not justify rejection of a condominium conversion because of a low vacancy factor.
10. If an ordinance completely barred adult bookstores, it might not be upheld, but this was simply a reasonable regulation. The court held that the burden of establishing unreasonableness was on the plaintiff. The court rejected an argument of the plaintiff that the zoning was an invalid restraint on speech.
11. The zoning was held to be invalid. The California Supreme Court held that people have the right of privacy, which includes the right to live with whomever they choose. They held that this statute violates that right of privacy. The court noted that the size of related families was not limited, but the limitation only applies to unrelated families.
12. The court held that the residential care facility was not inconsistent with residential use and must be allowed by law. (Six or fewer clients would be consistent with single-family use.)
13. Yes, the California Supreme Court held that the growth control ordinance did not violate Pardee's vested right to complete the development; it only affected the timing.
14. The Court of Appeal affirmed a trial court decision that the restriction was unenforceable because it was unreasonable. The court pointed out that the truck was not aesthetically unpleasant to a reasonable person, and pickup trucks are the convertibles of today and are socially acceptable.
15. The court held that injuries to the plaintiff were foreseeable and actions of the association may have been a breach of duty to the plaintiff. The court also held that a director may be personally liable for an organization's tort if the director authorized or participated in the tort. In this case, the facts were such to sufficiently allege the director's participation in tortious conduct.

Because of the danger of director's liability, CC1365.7 was enacted, which places monetary limits on the liability of volunteer directors and officers of common interest developments. By carrying liability insurance up to these amounts, they are now protected unless they failed to act in good faith or were willfully or grossly negligent.

16. The court held that in this case that restrictions were reasonable and that condominium owners can subject themselves to reasonable restrictions for the good of all. The Court of Appeal held that CC&Rs are equitable servitudes that are enforceable unless they are unreasonable restraints on alienation (Civil Code 711).

17. The Court of Appeal held that the use ordinance was valid under the police power for public welfare. It did not infringe on owner's constitutional right of due process and was not vague. Note: This was the first California decision upholding a residential rental limitation.
18. The superior court, which was affirmed by the Court of Appeal, ruled that the ordinance violated the equal protection clause of the California Constitution. Over-occupancy can also apply to homeowners, and the city can only validly address population density by an ordinance applying to all residents, not just renters.
19. **The U.S. District Court held that a permanent injunction against enforcement of the ordinance was proper because the conversion ordinance was a taking.** Even though the ordinance did not deny owners of all productive use, it interfered with an owner's basic right to use.
20. An injunction should not be granted. The court pointed out that while the Health and Safety Code treats a residential facility for six or fewer people as a residential use, the statute was clear that it did could not be used to allow the use in this case. However, the California Fair Employment and Housing Act makes it illegal to discriminate against people with disabilities. A disability is an impairment that limits one or more life activities. The court also pointed out that the federal government also prohibits the use of restrictive covenants to discriminate against people with disabilities in group homes.
21. The Court of Appeal held that the city must refund the \$399,000 to the owner plus pay \$1,199,237 for lost income and profits. The unreasonable delay in issuing the building permit was a temporary taking, and the owner was entitled to compensation for the period of time that the use of the land was taken. The court cited the U.S. Supreme Court decision in *First English Evangelical Church v. County of Los Angeles*. Note: Under the Ellis Act (Unit 15), the owner has the right to go out of business.
22. The superior court ruled, "The restoration ordinance is a valid exercise of the city's police power..." **The Court of Appeal affirmed that it was not a taking because the ordinance requires the applicant to pay.** Note: This was the second appellate court decision to uphold view protection ordinances.
23. Design review cannot be used to exclude chain stores. The Friends of Davis sought to compel the city to rescind development approval for a Borders Bookstore and force the city to use its design approval ordinance to keep out chain stores. The appellate court denied relief, noting local police power relates to health, safety, morals, and general welfare, not selection of specific tenants. (The Friends of Davis had sought to keep out competition for local bookstores.)
24. The superior court jury ruled that the unrecorded fence regulation was enforceable and granted the injunction plus \$318,293 in attorney fees. **The Court of Appeal**

affirmed, noting that the enforcement procedure was fair, in good faith, and applied uniformly.

25. The trial court denied a writ of mandate for return of fees. The Court of Appeal upheld the trial court and indicated fees need not to be tied to the impact of the development but could be part of an overall effort to tackle affordable housing problems.

UNIT 14: ESCROW AND TITLE INSURANCE

1. The seller can get quiet title, in which case buyer can recover the purchase money paid to the seller. Of course, escrow would be liable for losses and costs caused by its negligence. (See *Hildebrand v. Beck* (1925) 196 C. 14. Escrow made unauthorized delivery of deed. The deed was held to be void and convey nothing.)
2. The court held that the escrow had no duty to the real estate broker. There would only have been a duty if there had been an assignment of the money. Without a notice of assignment, escrow must obey its principals. If escrow had failed to follow the direction of the seller, then escrow could have been liable for any resulting loss.

In this case, there was no evidence that the escrow knew of the contract, and even if it had known, the contract did not require payment out of escrow. Payment could still have been made outside of escrow.

3. Without signed instructions, failure to deposit a check in excess of the instructions was not considered negligence.
4. The court held that no liability attaches to the escrow holder for failure to do something not required by terms of the escrow or for loss incurred while obediently following escrow instructions. (Agency of an escrow is limited to specified duties.)
5. The court held that the defendant was not liable because the defendant had not acted negligently or failed to obey instructions. (Neutral escrows do not always offer advantages over formal closings where both parties are represented by attorneys.)
6. While the lender was negligent in paying off the trust deed outside escrow, the escrow was liable for the loss. Their affirmative act in recording the deed of reconveyance violated the instructions and allowed the fraud to be perpetrated. In this case, instructions were verbal. Escrow instructions do not always have to be written to bind escrow.
7. Because there was no contract between plaintiff and insurer, the plaintiff has no rights based on breach of contract. (Also, a preliminary title report does not create any liability if insurance is not obtained.) Warrington was a stranger to the transaction in which the report was prepared and, therefore, was outside the scope of the insurer's liability.

8. When an insurance company fails to defend the title, even though in good faith the company believes the title is not covered, it does so at its peril. **If a court determines the claim was covered, the insurance company is liable to the full claim, even if it is in excess of its policy limits.** (The claim could probably have been settled within policy limits if the insurance company had acted in insured's best interests.)
9. No negligence was found because the court held that the escrow had no duty to warn the seller or give the seller information that equipment should remain fixtures under the trust deed or should be secured by a separate lien. In this case, the agent represented the buyer. There could be agent liability in failing to disclose dangers in the arrangement.
10. Where an agent intentionally made itself party to the agreement, the agent is liable for breach of contract. After the agent agreed to withhold funds, the agent could not unilaterally fail to do so.
11. The insurer was held liable for the decrease in value. The court held that the exclusion should be construed as referring to the normal unrecorded water rights (riparian, prescriptive, or prior appropriation.) The court held that an ambiguity about coverage should be construed against the insurer in favor of the weaker party.
12. Escrow was negligent to hold an undeposited check without notifying the seller. **The court held that escrow had the same liability as if escrow had been holding cash.** By giving a check that was not to be deposited, the buyer was able to tie up the property without cash. (If the seller was entitled to the deposit, escrow would have to turn over the cash.)

UNIT 15: LANDLORD-TENANT LAW

1. Civil Code 1942.5 should not be literally construed as to retaliatory eviction. **The court held that, even though not specifically covered by statute, common law rights to protect against retaliatory eviction still exist in California, and this eviction was retaliatory.** While CC1942.5 does not cover a situation such as this, the reasons given for retaliatory eviction are concerned with the tenant asserting rights to the property, not attacks on people. The state's interests in encouraging reporting of crime, particularly sexual assaults on children, outweigh the state's interests in preserving the summary nature of unlawful detainer action.
2. While CC1668 holds that exculpatory clauses exempting people from their own negligence are against public policy, the court held that this does not really apply to this case. There is no public policy that prohibits a lessee from assuming a risk from the lessor.
3. The California Supreme Court held that a breach of implied warranty of habitability was a proper defense. The common law rule that a landlord has no duty to maintain the premises no longer exists.

The duty to pay rent is mutually dependent on fulfillment of implied warranty of habitability. Habitability does not mean the premises must be perfect; it means bare living requirements must be maintained. Substantial compliance with building and housing code standards materially affecting health and safety would, in most cases, suffice to meet the landlord's obligation.

4. There are no questions as to the defendants being liable for compensatory damages. They knew of a danger and intentionally concealed it. **To collect punitive damages, the plaintiff must prove the defendant acted with conspicuous disregard to the plaintiff's safety.** The facts alleged were sufficient to support a claim for punitive damages, as well as compensatory damages.
5. The Court of Appeal ruled for the landlord and held that the base rent should have been adjusted to prevailing rents for comparable units. (The court did not want to penalize a landlord for having charged below-market rents.)
6. The court ruled that the renewal rent should be based on the particular purpose for which the premises had been leased and not the rental value of another use.
7. Once representations were made as to security, there was a duty to maintain security. **If the tenant and the owners association misrepresented the security, it could be held liable.** Some property owners groups advise their members not to advertise security because it could be a warranty and expose them to liability.
8. While the police may have believed the owner had authority to authorize a warrantless search, the court pointed out that a landlord lacks authority to consent to police entry, absent any evidence of abandonment or eviction. In this case, the tenancy had not expired, and the owner believed the tenant to still be in possession.
9. The locked doors should have put the purchaser on inquiry as to claim of the lessee. The burden of inquiry was on the purchaser. Whether the purchaser knew of the possession by the lodge is immaterial. It was the purchaser's duty to find out who was in possession and ascertain their interests. Because the purchaser had constructive notice of the tenant's interest, the purchaser is bound by the lease. (Modern courts would likely provide a buyer a remedy against the seller in a case such as this because of the failure to disclose the lease.)
10. The court held that agreement to maintain the landscaping does not release the owner from liability. The duty of care of an owner in possession is to inspect the property's condition. The same principle applies to owners not in possession.
11. Approval of the final map was not held to be an exemption from the ordinance, even though approval was before the ordinance because at the time of the ordinance, the structure was still rental housing.
12. The Court of Appeal, while agreeing that the plaintiff's act was without conscience, held that the automatic assessment for the entire 60-day period was constitution-

ally excessive. **The Supreme Court, however, held that the evidence supported the court award.** They pointed out the rent received in the month the gas bill was not paid was over twice the gas bill. Utilities were cut off during cold weather, and seven of the tenants forced to live without heat were children. The court indicated the statutory \$100 per day applies per unit, not per tenant. (This was also the trial court's interpretation.)

13. The court held that while Proposition 13 did not include relief for renters, such relief was consistent with the initiative. The court further held that the one-year reduction was not a substantial impairment of contract.
14. The superior court held that there was no causal nexus between the plaintiff's injury and failure to light the garage. **The Court of Appeals affirmed and held that a landlord is not liable for criminal acts of third people off the premises.** Note: The landlord might be liable if the plaintiff had been robbed and shot next to her garage, but because she avoided the danger, the landlord escapes liability.
15. The eviction was held to be proper because the parents were responsible for illegal conduct on the premises even though they did not know of the drugs. Note: Use of such a clause gives landlords a powerful tool that can also serve as a deterrent to drug use.
16. The trial court found that the excess was in fact a security deposit. The trial court also refused to allow Islay to offset damages for return of deposits because Islay failed to make an accounting, and the court awarded attorney fees of 25% of the aggregate amount. The Court of Appeals affirmed all issues except offsets. (Penalties and interest were not awarded because the court had not found that Islay acted in bad faith.) The aggregate of claims in this class action exceeded \$1,000,000. This case was an attempt to get around the *Baumann v. Islay* (1973) 30 C.A. 3d 752 decision, but it backfired.
17. The court held that the condition for lease approval was unconscionable. Civil Code 1995.240 allows only reasonable consideration for a lease assignment. Note: The lease could have set forth a sharing of excess rent agreement.
18. The court ruled that the ban on subleasing was unreasonable and therefore unenforceable. While park rules can be changed without homeowner consent upon a six-month written notice, unreasonable restrictions will not be enforced.
19. The Court of Appeal reversed the Los Angeles Superior Court, ruling that the trial court erred in ruling that defendants had no duty to assure that a minor child would not fall out of a low, open window (window was kept open). **The court held that a landlord must exercise due care for residents' safety in areas under the landlord's control.** The defendants had moved for summary judgment arguing they had no duty to assure a child did not fall out of a window. The Los Angeles County Superior Court granted summary judgment for the owners and managers.

The Court of Appeal ruled that summary judgment was not proper and there was a triable issue as to whether the defendants breached their duty of care by maintaining a low, open, unprotected hallway window knowing that young children were likely to play there.

20. The court awarded the tenants \$89,000 for personal property plus \$12,432 in court costs. The court held that the landlord's duty to provide habitable premises is independent of the tenant's duty to pay rent.
21. The park was held liable. The court noted that Civil Code Sections 798.55 and 798.56 authorized the mobile home park owners to obtain an injunction or terminate a tenancy for a resident that constitutes a substantial annoyance to other homeowners or residents. The court stated, "The perpetrator of the interference with the tenants' quiet enjoyment need not be the landlord personally. There may be an actionable breach where the interference is caused by a neighbor or tenant claiming under the landlord." This case seems to require a reasonable response by a landlord to tenant complaints. In this case, it was approximately 50 calls to management of splashing mud on newly washed vehicles, aiming a video camera into a living room, racial epithets, other verbal abuse, forcing a vehicle off the road, and finally battery.
22. There was no unconstitutional taking of property. The landlords did not have to place their security deposits into special accounts. They could use the deposits as working capital or other investments. Note: This case was brought by property owners who were not subject to the trust fund requirements of the real estate law. If it had been brought by a property management firm, then the reasoning of the court would not hold up.
23. The court ruled that there was no successor to the Bank of Irvine lease, so the clause could not be enforced. **The court set the fair rent.**
24. The Court of Appeal reversed, ruling that the tenant was not barred from showing that the claims were materially and unreasonably inaccurate. Exculpatory clauses do not protect a lessor from fraud.
25. The court held the purchaser was liable and there was no due process violation in burdening a purchaser to utilizing due diligence before purchase.

Note: The new owner could go against the prior owner.

26. The trial court ruled for the landlord, and the Court of Appeal affirmed it would not be reasonable to hold the landlord liable if the landlord did not have the power or ability to eliminate the dangerous condition, and without knowledge the landlord had no opportunity to alleviate the problem.

27. The trial court ruled California laws did not preempt the rent control ordinance and a landlord could not evict a tenant for failing to accept new obligations.

The Court of Appeal affirmed that holding a substantive rent control ordinance may be a permissible exercise of a city's authority.

28. The Federal Court of Appeal pointed out that landlords have no right to rent uninhabitable housing and the REAP program served a legitimate government purpose.

UNIT QUIZ ANSWER KEY

Unit 1

1. (c) Most of our legal principles and terms come from the English common law. p. 2
2. (b) Latin, means “prior decisions.” p. 2
3. (a) From the Roman system of enacted statutes. p. 2
4. (c) p. 2
5. (c) Prohibits taking private property without just compensation. p. 6
6. (a) p. 4
7. (a) p. 8
8. (d) p. 9
9. (c) p. 9
10. (a) p. 10
11. (c) p. 9
12. (a) p. 9
13. (b) p. 10
14. (c) p. 16
15. (b) p. 14
16. (b) p. 14
17. (d) p. 14
18. (a) p. 15
19. (b) p. 16
20. (a) p. 16, 17
21. (c) p. 17
22. (d) p. 17
23. (b) p. 18
24. (b) p. 18
25. (d) p. 17

Unit 2

1. (d) p. 27
2. (a) Must be consensual. p. 27
3. (b) To procure a buyer or property. p. 28
4. (c) p. 29
5. (a) p. 30
6. (a) You accepted the benefits. p. 30
7. (d) Either but not both can be held liable. p. 43
8. (d) p. 31, 32
9. (d) p. 31
10. (b) See Case Study. p. 32
11. (a) p. 35
12. (b) p. 36
13. (d) p. 36
14. (b) p. 31
15. (a) p. 37
16. (b) p. 41
17. (d) p. 31, 41
18. (d) p. 43
19. (c) p. 43
20. (d) p. 43
21. (d) p. 43
22. (c) Death terminated the agency agreements (listings). p. 46
23. (a) Corporation is a separate entity. p. 46
24. (c) p. 46
25. (b) p. 47

Unit 3

1. (b) And the best test is the "Golden Rule." p. 56
2. (a) Direct responsibility to employer. p. 57
3. (d) The broker has a supervisory duty. p. 56
4. (c) p. 57
5. (a) p. 57
6. (b) p. 80
7. (b) This is not pertinent information. p. 59, 65, 71
8. (c) This is pertinent information that must be conveyed to owner. Revealing other offer could affect owner's bargaining position. p. 60
9. (a) p. 59
10. (c) Agency is completed. p. 60
11. (b) p. 61
12. (a) p. 61, 62
13. (c) p. 60
14. (c) p. 60, 65
15. (c) It is a group boycott. p. 80
16. (d) p. 64–65
17. (c) p. 64
18. (a) p. 73
19. (b) p. 76

20. (b) p. 64, 71
21. (c) A statement of opinion. P77
22. (c) p. 79
23. (d) p. 78
24. (d) p. 81
25. (d) p. 81

Unit 4

1. (b) p. 102
2. (b) Not acting in an attorney capacity. p. 97, 96
3. (b) p. 99
4. (b) p. 100
5. (c) p. 100
6. (b) Without the consent of all parties. p. 101–103
7. (d) Required disclosure. p. 101–103
8. (a) Violated confidentiality of information received in government capacity. p. 102
9. (d) There is a limit as to what the recovery fund will pay. p. 105
10. (d) Or licensed by Corporation Commissioner. p. 105
11. (d) Limit applies to second trust deeds under \$20,000. p. 107

12. (d) p. 109
13. (b) p. 112
14. (d) p. 112
15. (c) Any amount over \$50. p. 113
16. (c) p. 116
17. (b) As creditors could have claims against goods purchased. p. 116
18. (d) p. 118
19. (a) Case example. p. 118
20. (d) Sex and familial status discrimination. p. 118, 130
21. (c) p. 118
22. (c) Inducing panic selling. p. 121
23. (c) p. 121
24. (b) p. 121
25. (d) Commissioner action. p. 122

Unit 5

1. (a) p. 143–145
2. (b) p. 146
3. (b) A meeting of the minds. p. 147
4. (c) Not a condition. p. 148–150
5. (c) p. 149
6. (c) p. 149

7. (d) A completed gift. p. 153
8. (d) p. 154–155
9. (d) It was not fraud since Albert knew Keith was lying. p. 155
10. (c) Irrevocable offer. p. 156
11. (d) p. 157
12. (c) p. 160
13. (b) p. 161
14. (c) p. 162
15. (b) Because buyer intended to occupy a one-to-four unit property, damages are limited to 3% of purchase price. p. 162
16. (a) So money damages may not be adequate. p. 163
17. (d) p. 161, 164–165
18. (c) p. 164–165
19. (c) p. 145
20. (a) Can be performed within one year. p. 165
21. (b) p. 167
22. (c) Valid but unenforceable. p. 168
23. (a) p. 168
24. (b) p. 169
25. (d) p. 170

Unit 6

1. (c) p. 182
2. (d) p. 182
3. (c) p. 182
4. (c) p. 182
5. (c) p. 183
6. (d) No contract with buyer and agent's remedy is the commission. p. 183
7. (d) p. 183
8. (b) p. 190
9. (a) p. 184
10. (d) p. 184
11. (b) The broker with the listing. p. 190
12. (a) Found in a listing. p. 190
13. (a) p. 191
14. (c) p. 191
15. (c) p. 191
16. (d) p. 190
17. (d) p. 198
18. (b) p. 198
19. (c) p. 198
20. (d) p. 214
21. (c) p. 219
22. (b) p. 219
23. (b) p. 219

24. (b) p. 220
25. (b) p. 220

Unit 7

1. (b) p. 238–239
2. (a) p. 239
3. (b) But oil rights are real property. p. 239
4. (a) p. 240–241
5. (d) Others are appurtenances and transfer with the realty. p. 241
6. (b) p. 242
7. (a) p. 243
8. (b) p. 243
9. (a) p. 245
10. (c) p. 245
11. (b) p. 246
12. (a) p. 247
13. (b) p. 247
14. (c) p. 246
15. (a) p. 247
16. (d) p. 248
17. (b) p. 248
18. (c) p. 249
19. (b) p. 248–249
20. (a) p. 250
21. (c) p. 250
22. (b) p. 250

- 23. (b) p. 250–251
- 24. (c) Alphabetically.
p. 252
- 25. (d) p. 252

Unit 8

- 1. (c) Ownership by a single person. p. 260
- 2. (b) p. 260
- 3. (c) p. 260
- 4. (c) p. 260
- 5. (d) p. 261
- 6. (b) p. 261
- 7. (b) p. 261–262
- 8. (a) p. 262
- 9. (c) p. 264
- 10. (c) p. 269
- 11. (a) p. 265
- 12. (c) p. 268–269
- 13. (b) p. 272
- 14. (b) p. 272–273
- 15. (a) p. 273
- 16. (d) p. 274
- 17. (c) p. 275
- 18. (d) They are separate entities. p. 275–276
- 19. (d) p. 273, 275, 276
- 20. (a) p. 281
- 21. (b) p. 281
- 22. (d) p. 282

- 23. (d) p. 282
- 24. (b) p. 285
- 25. (d) p. 287

Unit 9

- 1. (a) Alteration voided the deed. p. 300
- 2. (a) p. 301
- 3. (a) p. 301
- 4. (b) p. 301
- 5. (c) Not a definite grantee. p. 301–302
- 6. (b) p. 302
- 7. (d) p. 301–302
- 8. (d) p. 302–303
- 9. (b) Whatever interest grantor has. p. 305
- 10. (c) p. 305
- 11. (d) p. 302, 306
- 12. (a) p. 307
- 13. (a) But must occupy it. p. 309
- 14. (c) p. 309
- 15. (c) p. 311
- 16. (c) p. 313
- 17. (c) p. 313
- 18. (d) p. 315
- 19. (b) p. 315
- 20. (b) p. 315
- 21. (d) Ademption. p. 315

- 22. (d) All community property to spouse if intestate. p. 317
- 23. (a) Grandchildren take by right of representation. p. 317
- 24. (d) Inheritance is by blood. p. 317
- 25. (c) 10% higher on first \$10,000; 5% higher on remainder. p. 318

Unit 10

- 1. (b) p. 328
- 2. (c) p. 358–359
- 3. (b) p. 329
- 4. (d) p. 333
- 5. (d) p. 332
- 6. (d) p. 336
- 7. (b) p. 340
- 8. (d) p. 341
- 9. (c) p. 342
- 10. (a) Three months plus 20 days. p. 341–342
- 11. (b) p. 345
- 12. (b) p. 345
- 13. (c) p. 346
- 14. (c) p. 346
- 15. (b) p. 350
- 16. (b) p. 350
- 17. (c) p. 351–352

18. (a) Can use seller's equity. p. 352–353
19. (c) p. 359
20. (d) p. 353
21. (c) p. 354
22. (a) p. 355
23. (d) p. 355
24. (d) p. 356–357
25. (b) Up to midnight of third business day. p. 357

Unit 11

1. (d) They are voluntary liens. p. 384
2. (b) A general lien against all of debtors property in the county where recorded. p. 369
3. (b) It would be a judgment lien. p. 369
4. (c) p. 369
5. (c) p. 369
6. (d) p. 371
7. (b) p. 372
8. (a) p. 372
9. (d) p. 369–372
10. (b) p. 373
11. (c) p. 373
12. (b) A mechanics' lien. p. 374
13. (d) p. 374
14. (c) Because prior trust deed has priority. p. 377
15. (b) p. 378
16. (c) As do prime contractors. p. 378
17. (d) Lien rights go back to date work started. p. 380
18. (b) p. 380
19. (b) p. 381
20. (d) p. 381
21. (c) p. 382
22. (d) p. 382
23. (d) Must reside on premises to file. p. 382
24. (d) All must be recorded to be valid. p. 369, 383
25. (d) p. 384

Unit 12

1. (d) p. 392
2. (d) p. 393
3. (a) p. 395
4. (c) p. 395
5. (d) p. 395
6. (c) p. 396
7. (c) p. 396
8. (b) p. 397
9. (c) Lakes or seas. p. 397
10. (d) Correlative user refers to underground water. p. 399
11. (b) Joined to. p. 397
12. (b) p. 397
13. (b) p. 397
14. (c) p. 400
15. (b) Because it is a "right." p. 399
16. (d) Can be multiple easement holders and licensees. p. 401
17. (c) Must actually stop the use. p. 401–402
18. (c) p. 403–404
19. (c) p. 404
20. (b) p. 404
21. (b) p. 405
22. (d) p. 405
23. (c) Non-use only terminates prescriptive easements p. 405
24. (d) Because permissive use. p. 406
25. (d) It is a revocable personal privilege. p. 406

Unit 13

1. (c) p. 418
2. (a) p. 419
3. (b) p. 420

4. (b) p. 426
5. (b) p. 420
6. (b) p. 422
7. (c) p. 424
8. (a) p. 425
9. (a) p. 425–426
10. (d) p. 426–427
11. (d) p. 427
12. (a) p. 427
13. (d) p. 427
14. (a) p. 429
15. (c) p. 432
16. (c) p. 432
17. (c) p. 429, 432, 433
18. (d) p. 432–433
19. (b) p. 429, 433
20. (c) p. 434
21. (b) p. 434
22. (b) p. 429
23. (c) p. 434
24. (a) p. 439
25. (d) Case example.
p. 439

Unit 14

1. (c) p. 450–451
2. (c) p. 451
3. (d) Buyer and seller.
Agent is not a party to
escrow. p. 451

4. (a) Because it is signed
later. p. 451
5. (b) p. 452
6. (d) p. 452
7. (d) p. 453
8. (d) p. 453
9. (c) p. 454
10. (b) It generally passes
with possession. p. 455
11. (d) p. 455
12. (c) p. 456
13. (c) p. 457
14. (c) p. 458
15. (a) p. 458
16. (b) p. 459
17. (d) p. 459
18. (c) p. 460
19. (d) p. 460
20. (b) p. 460–461
21. (d) p. 460–461
22. (c) p. 461
23. (d) p. 462
24. (b) p. 462
25. (d) p. 463

Unit 15

1. (b) Lease for a definite
term. p. 473
2. (a) Because the term is
definite it must be by
express agreement. p. 473

3. (b) It is not agricul-
tural land. p. 473
4. (b) p. 475
5. (c) p. 475
6. (d) p. 478
7. (b) p. 478
8. (d) p. 480
9. (b) p. 480
10. (b) p. 480
11. (c) Lease terminated
by merger. p. 481
12. (c) p. 483
13. (a) p. 484
14. (b) Landlord responsi-
bility. p. 492
15. (d) p. 485–486
16. (c). p. 492, 497
17. (c) Case example.
p. 490
18. (b) Others would be
quit or quit or cure.
p. 493
19. (b) p. 494
20. (a) p. 495
21. (d) p. 498
22. (a) p. 498
23. (b) p. 498
24. (c) Eviction is limited
to specified reasons.
p. 496
25. (a) p. 501

GLOSSARY

For a more comprehensive explanation of legal terms, you may want to use *The Language of Real Estate* by John W. Riley (Dearborn Publishing).

abatement An action to remove a nuisance.

abstract of judgment A statement from the court of the judgment. When recorded, it becomes a general lien on all of the debtor's property in the county where recorded.

abstract of title A copy of all recorded documents dealing with a property. Attorneys give title opinions based on abstracts.

acceleration upon default All payments become due upon default of any payment. For trust deeds and mortgages in California, the debtor still can cure the default before foreclosure or sale by getting payments caught up and paying the costs.

accord and satisfaction An agreement to accept a lesser consideration than bargained for based on disagreement over performance.

accretion The gradual buildup of land by natural causes (generally by action of water).

acknowledgment A statement made before a notary or court officer that the signing of a document was the signer's own free act.

actual notice Notice that has been expressly given and is known to a party.

ademption The revocation of a specific property grant in a will by disposing of said property before death.

administrative agency A government agency that makes rules and regulations to carry out the law.

Administrative Procedure Act A procedural act that must be complied with before revocation, suspension, or denial of a real estate license.

administrator A person appointed by the court to administer the estate of a deceased person.

ad valorem taxes Taxes based on value, such as property taxes.

advance costs Advance payments made to an agent to cover expected cash outlays in carrying out the agency.

advance fee A fee for rental information accepted in advance, or a promotional fee for a sale listing.

- advance fee addendum** An agreement specifying activities for which the agent is to be compensated. It would include a provision for an advance payment of fees.
- adverse possession** A method to acquire title. It requires five-year, open, notorious, uninterrupted use under some claim of right and the payment of taxes.
- aesthetic zoning** Zoning for beauty. (Aesthetic zoning can require architectural styles and colors and regulate signs, etc.)
- affirmation** A formal declaration of the truthfulness of a statement, given in lieu of a verification.
- affirmative covenant** A covenant under which an owner is required to do something, such as build within a stated period of time.
- affirmative easement** Easement that gives the dominant tenement owner the right to use the servient tenement.
- after-acquired title** Title or interest acquired by the grantor after property has been conveyed.
- agency** Legal relationship under which an agent represents another (a principal) in dealings with third parties.
- agency by estoppel** An agency created when a principal's conduct led another to believe in the existence of the agency and thereby to act to his detriment.
- agency by ratification** An agency created by a principal's approving an unauthorized act of another.
- agency coupled with an interest** Agency in which an agent has a financial interest in the subject matter of the agency.
- agent** One who represents another in an agency relationship.
- Alquist-Priolo Special Studies Zone Act** Provides for project approval in close proximity to earthquake faults, as well as disclosures to buyers.
- alteration** A change made to a note or contract by one of the parties without the consent of the other.
- amendments to the escrow instructions** Changes in the escrow instructions, which require the agreement of both the buyer and the seller.
- American Land Title Association (ALTA)** The association that developed an extended-coverage policy of title insurance for lenders (same coverage available to buyers).
- Americans with Disabilities Act** Prohibits discrimination in a place of public accommodation based on an individual's physical or mental disabilities.
- amortized note** A note that will liquidate itself over its term in equal installments.
- annual percentage yield (APY)** Annual yield on investments considering the compounding of interest earned.
- anticipatory breach** Act of a party that can be treated as a breach of contract because it makes performance by that party impossible.

- antimerger clause** A clause in a mortgage or trust deed that the senior lienholder will retain lien priority in the event of a merger (title given to the senior lienholder).
- appurtenance** Something that belongs to and goes with property (examples: a structure and easement rights).
- arbitration** Nonjudicial process for resolution of disputes either by agreement or mandated by law.
- Article 5** Part of the Business and Professions Code governing transactions in trust deeds and real property sales contracts.
- Article 7** Part of the Business and Professions Code covering loan costs, commissions, and payment requirements relating to loan brokerage activity.
- “as is”** A phrase used in sale contracts by sellers as an attempt to limit liability for the condition of the premises (not generally valid when applied to latent defects known by the seller but not disclosed to the buyer).
- assignment** Transfer of all interest in a contract or lease.
- assignment of contract** Transfer of all rights under a contract to a third party. Assignor remains secondarily liability.
- assignment of lease** The transfer of all rights under a lease by a lessee to a third party, who becomes a tenant of the lessor. The assignee is primarily liable under the lease, while the assignor has secondary liability.
- assignment of rent** Owner assigns right to collect rent to another. Usually given to a lienholder when owner is delinquent in loan payments.
- assumable loan** A loan that can be taken over (assumed) by a purchaser. Such a loan would not have a due-on-sale clause.
- assuming a loan** The buyer's agreeing to be primarily liable on the loan while the seller has secondary liability.
- attachment** A prejudgment lien that can be obtained to ensure the availability of property for execution after a judgment is obtained.
- attorney-in-fact** A person appointed as an agent under a power of attorney.
- attractive nuisance doctrine** An owner has a duty to reasonably protect children from injury when the premises are likely to attract children.
- avulsion** The sudden removal of land by action of water, such as a river changing its course.
- bait and switch** Illegal practice of advertising where a seller will not sell an item at a price advertised or does not have the item to sell in order to bring in buyers for other items.
- balloon payment** A final payment that is more than twice the amount of the lowest payment.
- bankruptcy** Federal proceedings to declare a debtor bankrupt. The debtor is relieved of unsecured obligations (secured obligations when security is given up).
- beneficiary** Lender (or seller) in a trust deed loan situation.
- beneficiary statement** Statement by beneficiary as to balance due on loan.
- bequest** Personal property transferred by will.

- bilateral contract** A mutual exchange of promises; a promise given for a promise.
- blanket encumbrance** A mortgage or trust deed covering more than one property.
- blind ad** An advertisement that fails to reveal that the advertiser is an agent and not a principal.
- blockbusting** Inducing panic selling based on fear of the entry of people of another race, color, religion, or ancestry into the area.
- breach of contract** Failure to comply with a material term or provision of a contract.
- broker** Licensed real estate agent who can deal directly with principals and employ licensed real estate salespeople.
- broker's loan statement** A disclosure statement given to borrowers by mortgage loan brokers that provides information on all costs, fees, and loan terms.
- Bulk Sales Act** An act that requires recording and publication of a sale not in the normal course of business.
- bulk zoning** Zoning for density with open-space requirements, as well as setback, parking, and height restrictions.
- bundle of rights** All beneficial rights that go with ownership of real property.
- burden of proof** The party required to prove a fact when an issue is in dispute.
- Bureau of Real Estate** Administers the California real estate law (part of the California Department of Consumer Affairs).
- business opportunity** A business, including fixtures, stock in trade, and goodwill.
- buyer listing** An agreement whereby a buyer agrees to pay a commission if the broker locates a property the buyer purchases.
- California Environmental Quality Act** Law that allows local government to require environmental impact reports and allows private citizens to challenge a project if they feel proper procedures were not taken or a report is not complete.
- California Fair Employment and Housing Opportunity Act** California's fair housing act; known as the Rumford Act.
- California Homeowners Bill of Rights** Intended to guarantee fairness and transparency for homeowners in the foreclosure process.
- California Housing Financial Discrimination Act of 1977 (Holden Act)** California act prohibiting lender discrimination for any reason unrelated to the credit of the loan applicant.
- carryback financing** Financing where the seller is financing the buyer.
- Cartwright Act** California's antitrust act.
- caveat emptor (let the buyer beware)** Former rule of law that the buyer was responsible for determining condition of item purchased. It has been superseded by disclosure requirements and antifraud legislation.

- CERCLA** Federal Comprehensive Environmental Response, Compensation and Liability Act dealing with liability of owners, prior owners, and polluters of property for cleanup costs.
- certificate of sale** Certificate issued to purchaser at sheriff's sale. (The sheriff's deed is given at the expiration of the redemption period.)
- cessation of work** A period of 60 days without any work being conducted.
- chattels** Items of personal property.
- chattels real** A personal property interest in real property, such as a leasehold interest, trust deed, or mortgage.
- chose in action** A right to demand money or personal property through legal action such as a promissory note.
- civil law** System of law codified by statutes.
- Civil Rights Act of 1866** An act providing that all citizens have the right to inherit, purchase, lease, sell, or hold real and personal property.
- Civil Rights Act of 1968** Title VIII of this act is known as the federal Fair Housing Act. The act prohibits discrimination in housing with few exceptions.
- clean hands doctrine** A person in violation of an agreement will not be able to enforce compliance on another (applies to covenants, conditions, and restrictions).
- closing** The final performance of a real estate transaction where title is transferred and consideration is given.
- Coastal Zone Conservation Act** Law that requires permit or exemption to develop land within a coastal zone.
- codicil** An amendment to a will requiring the same formalities of the will.
- color of title** An appearance of having title without necessarily having any legal interest.
- commercial frustration** Performance that is not impossible but is impractical because of an unforeseen occurrence. The nonoccurrence of the act or event was considered an implied condition for the contract, which allows relief from the contractual obligations.
- commingling** Failure to properly separate property of the agent from property of the principal.
- common elements** Jointly owned areas in a common interest development for use of all owners.
- common interest subdivision** Subdivision where areas are owned in common with other owners for mutual use.
- common law** Law that has evolved based on precedent rather than statutes.
- community apartment project** An apartment building owned by the tenants in a tenancy in common, with each owner having the right to occupy a unit.
- community property** Property acquired during marriage that is considered, as a matter of law, to be owned equally by the spouses.

- community property with right of survivorship** Community property where the spouses cannot separately will their portion of the community property to another.
- compensatory damages** Monetary damages to reimburse an injured party for a sustained loss.
- competent parties** Parties having the legal and mental capacity to contract.
- comprehensive zoning** A broad plan of zoning over a large area.
- concurrent estates** More than one estate interest in a property at the same time (such as a leasehold estate in a fee simple ownership).
- conditional public report** An interim report that allows a subdivider to enter a binding contract before issuance of a public report.
- conditional-use permit** A change in the zoning granted for the best interest of the community, where the zoning contemplated the use based on approval.
- condition precedent** A condition that must take place before an estate is granted. Provisions in a title that, if breached, could result in forfeiture of interest.
- condition subsequent** A condition that, if it occurs, results in the reversion of an estate to another.
- condominium** Separate ownership of the airspace of a unit and common ownership of land and common areas.
- condominium conversion** The conversion of a property (generally an apartment building) to condominiums.
- consideration** Value that is given for the promise of another.
- constitutional law** Law set forth in federal and state constitutions.
- constructive eviction** An act of the landlord that would be inconsistent with the quiet enjoyment of the tenant or the implied covenant of habitability. The tenant can treat the action of the landlord as being equivalent to eviction and may vacate the premises and be relieved of all future obligations.
- constructive notice** Notice imputed by law, although not necessarily actually known (recording, as well as possession, by another provides constructive notice to a purchaser of other interests).
- contingent remainder** A remainder interest that is not certain but requires something to happen.
- continuation statement** A statement that when filed continues a financing statement for an additional five years.
- contract** An enforceable agreement.
- contract of adhesion** A “take it or leave it” contract that takes unreasonable advantage of the party who did not prepare the instrument.
- controlled business arrangement** Businesses that are owned or controlled by real estate brokers that the broker refers buyers and sellers to (RESPA requires disclosure).

- cooperating broker fee agreement** Agreements between brokers as to the commission split should the cooperating broker sell a property listed by the listing broker.
- corporation** A separate legal entity established under state law. An artificial person.
- corporation license** Real estate license held by a broker in a corporate capacity as an officer of the corporation.
- Costa-Hawkins Rental Housing Act** Act that allows a new base rent for rent control property upon change of tenants.
- Court of Appeal (California)** Primarily appellate jurisdiction from superior court.
- Court of Appeals (federal)** Appellate jurisdiction from the district courts.
- covenants** Promises, the breach of which could entitle another party to damages.
- covenants, conditions, and restrictions (CC&Rs)** Private restrictions created by grantors that run with the land.
- Covered Loan Act** California act setting forth prohibited predatory lending practices for specified FNMA-conforming loans.
- cumulative zoning** Zoning that allows more restrictive uses. For example, a lot zoned for a duplex would allow a single-family residence if the zoning were cumulative.
- customary authority** Authority implied by virtue of an agent's position.
- declaration of homestead** When recorded, this declaration provides the homeowner a statutory exemption from execution by unsecured creditors.
- declaration of restrictions** Declaration recorded by a subdivider and incorporated by reference in every deed.
- declaratory relief action** An action to have a court determine the rights of parties.
- dedication** The transfer of real property to a public entity without consideration.
- deed** The transfer instrument for real property.
- deed in lieu of foreclosure** A deed given by the debtor to her creditor to avoid foreclosure.
- deed of reconveyance** The deed from the trustee to the trustor that is given when the note is paid in full. It returns the title to the trustor.
- defeasance clause** A clause that cancels the lien on payment of the note.
- defeasible estate** An estate that can be defeated by some future happening (condition subsequent).
- deficiency judgment** A judgment given to a creditor when a foreclosure sale is for less than the amount owed (judgment is for deficiency amount).
- delivery** The actual transfer of an interest. Delivery requires the intent to make an irrevocable transfer.
- demise** A transfer of a leasehold interest.

- demurrer** An answer to a complaint stating that even if the alleged facts are as stated, there is no cause of action.
- designated agency** One agent working for a broker represents the seller, while another agent working for the same broker represents the buyer.
- Development impact fees** A fee imposed by a local government on a new or proposed development project to pay for all or a portion of the costs of providing public services to a new development.
- devise** The transfer of real property by will.
- district court** Federal court of original jurisdiction.
- divisible contract** A contract consisting of separate agreements that are not dependent on each other.
- division fence** A fence on a boundary line.
- doctrine of agreed boundaries** Parties can agree to boundaries. They are binding on successors after being accepted by the parties for five years.
- Dodd-Frank Act** The act mandates the simplification of loan disclosures combined with truth and lending disclosures, as well as simplified closing statements.
- domestic corporation** A corporation organized in California under California law.
- dominant tenement** The estate having an easement right over land of another.
- double taxation** Corporate taxation whereby first corporate profits and then stockholders' dividends are taxed.
- downzoning** A change in zoning to a more restrictive use.
- dragnet clause** Clause in a trust deed that allows future advance to take precedence over intervening liens.
- dual agency** An agency situation in which the agent represents more than one party to the transaction.
- due care** Reasonable (nonnegligent) care.
- due diligence** A proper good-faith effort to perform or to investigate.
- due-on-encumbrance clause** A clause that makes the loan balance all due and payable should the owner put another encumbrance on the property.
- due-on-sale clause (alienation clause)** A clause that makes the entire loan balance due when the property is sold. A loan having a due-on-sale clause cannot be assumed.
- due process** Legal procedure that protects the rights of the parties.
- duress** Force or confinement that makes a contract voidable.
- easement** A right the owner of one property has to the land of another.
- easement by eminent domain** An easement that is taken for a public purpose under the power of eminent domain.
- easement by estoppel** An easement created when a person's words or actions led another to believe in the existence of the easement. If, in relying on those words or actions, the easement user acts to his detriment, the party will be estopped from denying the existence of the easement.

- easement by necessity** An easement that may be granted by the court when no other access to property exists and the easement is necessary for reasonable use of the property.
- easement by prescription** An easement obtained through five years' continuous, open, notorious, and hostile use of the property of another under a claim of right.
- easement in gross** An easement that is not appurtenant to land. It is personal in nature, and there is no dominant tenement.
- Education, Research, and Recovery Allocation** A fund maintained by 20% of license fees; 12% of the fund goes into the Recovery Account, and 8% goes into the Education and Research Account.
- elder abuse law** Requires that realty agents and escrow holders report elder financial abuse, or undue influence.
- emancipated minor** A minor who is allowed to contract (in military service, declared emancipated by a court, married, or formerly married).
- emblems** The right of a tenant to harvest the annual crops that were the fruit of her labor. This right extends beyond the expiration of a lease.
- eminent domain** The power of the government to take private property for the public good. Consideration must be given for the property taken.
- employee** One who works under the direction and supervision of an employer.
- Ellis Act** Allows a landlord to go out of business and withdraw units from the rental market.
- enabling legislation** Legislation that gives cities and counties the right to enact zoning.
- encroachment** An intrusion into, over, or under the land of another.
- endangered species** Federal legislation limiting development when it will have a negative effect on an endangered species.
- Endangered Species Act (ESA)** Federal act that can limit or prohibit development when a development adversely effects a species designated as endangered.
- environmental impact report (EIR)** A report that can be required under the California Environmental Quality Act when projects may have a significant effect on the environment.
- environmental impact statement** A statement required under the National Environmental Policy Act when a federal project will affect the environment significantly.
- Equal Credit Opportunity Act** A federal act prohibiting credit discrimination because of sex, marital status, age, race, religion, or national origin, or because the credit applicant is receiving welfare.
- equal dignities rule** If an agency act must be in writing, the agency authority to perform the act also must be in writing.

- equal housing opportunity poster** Failure of a broker to post this HUD notice shifts the burden of proof to the broker as to a discrimination complaint.
- escheat** A reversion of property to the state when a person dies without a will or heirs.
- escrows** Neutral depositories to carry out the closing function of a real estate transaction.
- escrow instructions** The instructions given to the escrow agent by the buyer and the seller.
- estate** Any interest in property.
- estoppel** The legal doctrine that people cannot raise a right or defense after their words or actions to the contrary led another party to act to that party's detriment.
- ethics** Morals. The golden rule is considered to be the test of whether an act is ethical.
- eviction** Removal of a tenant by action of law.
- exception in a deed** An exclusion of part of the property from a grant.
- exclusionary zoning** Zoning that excludes stated uses, such as adult entertainment.
- exclusive agency listing** A listing whereby the owner can sell the property personally without paying a commission, but if it is sold by any agent, the listing agent is entitled to a commission.
- exclusive authorization and right-to-sell listing** A listing whereby the agent is entitled to a commission no matter who sells the property, including the owner.
- exculpatory clauses** Clauses in an agreement that purport to relieve a party of all obligation for his or her acts, or failure to act.
- executed contract** A contract that has been fully performed.
- execution** The signing of an instrument.
- executor** Party appointed by testator to administer their estate.
- executory contract** A contract that has yet to be performed fully.
- exemplary damages (punitive damages)** Monetary damages to punish or make an example of a wrongdoer for willful, wrongful conduct.
- express agency** An agency agreement that is stated either verbally or in writing.
- express authority** The stated authority of an agent (written or verbal).
- express contract** A contract in which the terms have been stated either verbally or in writing.
- extended-coverage policy of title insurance** A policy that includes coverage for rights of parties in possession and claims that a survey would have revealed, as well as other risks.
- facilitator** While not an agent, the broker acts as a third-party middle person who attempts to bring parties together.

- Fair Credit Reporting Act** Provides consumer rights as to knowledge of, and correction to, credit reports.
- Fair Housing Amendment Act of 1988** Extends the Civil Rights Act of 1968 to include disability and familial status.
- Federal Personal Responsibility and Work Opportunity Act** Act that denies government benefits to illegal immigrants.
- fee simple** The highest possible degree of ownership in real property.
- fictitious name** A name that does not include the surname of every principal in an enterprise.
- fictitious name statute** Provides procedure for filing and advertising a fictitious name. When the statute is complied with, the firm can sue and defend a suit under the fictitious name.
- fictitious trust deed** A trust deed that is recorded for the sole purpose of being referenced in other trust deeds to incorporate its terms.
- fiduciary duty** The duty of trust and confidence.
- final map** Under the Subdivision Map Act, the final map is recorded when local approval has been obtained.
- financing statement** A statement that when filed with the secretary of state becomes a lien on personal property for five years.
- finder's fee** A fee paid to a nonlicensee for introducing a party.
- fixtures** Items of personal property that have become so attached to realty as to become real property.
- foreclosure** Procedure to bar all rights of a debtor in property.
- foreign corporation** A corporation organized in a state other than California.
- forfeiture** Loss of a right as punishment for an act or nonperformance of an act.
- four-by-fouring** The illegal attempt to avoid the Subdivided Lands Law by breaking one parcel into four parcels and having the grantees again break each parcel into four parcels.
- franchise** The right to engage in a business under a common marketing plan.
- Franchise Investment Law** A disclosure law administered by the corporation commissioner to protect prospective purchasers of franchises.
- fraud** An act or omission for the purpose of deceiving another.
- freehold estates** Fee simple or life estates.
- fructus industriales** Crops produced by labor and industry.
- fructus naturales** Products of the land produced by nature alone.
- Garn Act** Allowed lenders to enforce due-on-sale clauses.
- general agent** An agent with broad powers for the purpose of conducting a business.
- general lien** A lien against all the property of the debtor rather than specific property.
- general partner** A partner with management responsibility and unlimited liability.

- general plan** Every city and county is required to develop a general plan of comprehensive zoning for the area.
- gift deed** A deed given for love and affection.
- good faith** Conscientious and honest behavior.
- good-faith improver** An improver acting honestly under a mistake of fact or law who makes improvements to the land of another.
- grandfather clause** A provision that exempts present users from a requirement, such as zoning, and allows existing nonconforming uses.
- grant deed** Most common deed used in California to convey title. The grant deed warrants that the seller has not conveyed title previously and the grantor knows of nothing against the property that has not been disclosed.
- granting clause** The words of conveyance in a deed.
- grantor-grantee index** The index of a county recorder that is kept by grantor and grantee names alphabetically.
- group boycott** An agreement not to do business with a particular party or group (Sherman Act violation).
- habitability** Reasonably fit for human habitation.
- historical designations** Buildings that have federal or state historical designations; could be limited as to alterations and/or removal.
- hold-harmless clauses** Clauses that purport to relieve a person of liability for his actions.
- holder** Person having legal possession of a negotiable instrument.
- holder in due course** A purchaser of a negotiable instrument for value before its due date when the instrument appears proper on its face and the purchaser has no notice of any prior dishonor, defenses of the maker, or defects in title of the transferor.
- holdover tenant** A tenant who remains in possession after the end of a tenancy for years or after having given notice to vacate.
- holographic will** A will that is handwritten and signed by the testator.
- homeowners association (HOA)** Governing association of owners required for common interest subdivision.
- Homeowner's Guide to Earthquake Safety*** Real estate agents are required to give this guide to buyers, which includes known risk disclosures.
- homestead** The residential property for which an owner has recorded a declaration of homestead.
- homestead exemption** The amount of homestead protection from unsecured creditors. It is \$75,000 for single people, \$100,000 for family units, and \$175,000 for people over 65 years of age and people with physical or mental disabilities unable to work.
- hypothecate** To use property as security for a loan without giving up possession.
- illusory contract** Apparent contract that is no contract at all because parties have not agreed to be bound.

- implied agency** An agency created by the conduct of the parties rather than express agreement.
- implied authority** Understood (not express) authority that is reasonably necessary to carry out the agency.
- implied contract** A contract not expressly agreed to but understood by the parties.
- implied dedication** An implied donation of the property to the government that could result from allowing open government use of private property for five years.
- implied easement** An easement intended but not expressly provided for.
- implied warranty** Warranty understood but not stated. For residential leases, the implied warranties are of quiet possession and habitability.
- impossibility of performance** When required performance is impossible, the contract will be considered void.
- impound account** An account kept by a lender for taxes and insurance (included in borrower's payments).
- incentive zoning** Zoning that offers an incentive to developers, such as allowing retail stores on the street level in an area zoned for offices.
- inclusionary zoning** Zoning that requires a developer to include some element, such as a percentage of units for low-income housing.
- independent contractor** A contractor employed for the completion of a task who is not under the supervision or control of her employer.
- injunction** A court order to desist from some activity.
- installment note** A note that is paid off according to an installment payment schedule.
- interim occupancy agreement** An agreement that allows the buyer to take possession as a tenant before the close of escrow.
- intermediate theory (mortgage)** Mortgage in which title remains with the mortgagor but automatically transfers to mortgagee in the event the mortgagor defaults.
- interpleader action** An action brought by a third party (escrow or broker) when two or more parties claim property or money held by the third party. The action forces the parties to litigate their rights.
- Interstate Land Sales Full Disclosure Act** A disclosure act for subdivisions of 25 or more unimproved residential lots offered for sale in interstate commerce.
- intestate succession** The succession of property to the heirs when the deceased dies without a will.
- inverse condemnation** An owner's forcing a governmental unit to take property by eminent domain when the government's actions resulted in the owner's inability to use the property.
- involuntary liens** Liens placed against property by creditors, such as judgments, as opposed to those voluntarily placed against the property by owners.

- involuntary liens** Liens placed against property by creditors, such as judgments, as opposed to those voluntarily placed against the property by owners.
- joint tenancy** Undivided ownership by two or more people with the right of survivorship.
- joint ventures** Partnerships for particular ventures rather than continuing businesses.
- judgment** Order of a court as to amount due to plaintiff.
- judgment lien** A general lien against all property of the debtor in the county where the abstract of judgment is recorded.
- junior lien** A lien recorded later in time than another lien (senior lien).
- jurisdiction** The authority of a court to adjudicate a type of lawsuit.
- laches** Loss of rights because the delay in enforcing them now makes enforcement inequitable.
- late charge** A lender charge for a late payment.
- latent defects** Defects that are not apparent by visually checking the property.
- lateral support** Right of property owners to have their property supported by the adjacent properties.
- law** Enforceable rules that govern conduct.
- lease** A tenancy agreement between a landlord (lessor) and a tenant (lessee).
- leasehold** A lease estate in realty.
- lease option** A lease whereby the lessee has an option to purchase (or extend the lease).
- legacy** Money that is transferred by will.
- legal capacity** Being of legal age.
- license** A revocable privilege to use the land of another.
- lien** An encumbrance against real property that can be foreclosed.
- lien theory (mortgage)** Theory in California that a mortgage conveys lien rights and not title to the mortgagee.
- life estates** Estates conveyed for the lifespans of particular people.
- limited common elements** Common areas in a common interest development that are designated for exclusive use of particular owners.
- limited liability** Liability limited to the extent of a person's investment.
- limited liability company** A company of one or more principals without personal liability for company actions.
- limited partnerships** Partnerships having partners who are not active and whose liability is limited to the extent of their investment (limited partners).
- Limited Partnership Act** That part of the Corporation Code that provides for limited partnerships.
- liquidated damages** Damages agreed to, before a contractual breach, as the remedy in the event of a default.
- lis pendens** A notice of a pending lawsuit in which an interest in real property is involved.

- littoral rights** Rights of a landowner to reasonable use of water from lakes, seas, or oceans (nonflowing water) bordering his or her property.
- livery of seisin** Early English ceremony of transfer of title by delivery of a symbol of title, such as a key or clod of earth.
- loan broker (mortgage loan broker)** A broker who solicits borrowers and investors for loans secured by real estate.
- loan broker listing** A loan broker's contract with a buyer to obtain a loan.
- Loan Estimate** New form mandated by the TILA-RESPA rule that helps consumers to understand the key features, costs, and risks of a mortgage loan. It must be provided to consumers no later than three business days after they submit a loan application.
- lockbox authorization** An owner's authorization that allows the broker to install a lockbox. It includes a warning of danger and recommends that valuables be removed and insurance coverage be considered.
- lock-in clause** A loan prohibiting prepayment so that the borrowers are locked in to all of the interest should they wish to repay.
- marketable title** A defensible title that a reasonably prudent purchaser would accept.
- master lease** The original lease between the lessor and lessee when the lessee subleases the premises.
- maxims of jurisprudence** Rules of common law that have been codified into the California Civil Code.
- mechanics' liens** Statutory liens by improvers of property for labor, material, and equipment.
- mediation** A nonjudicial process for resolving disputes in which the third-party mediator works with the parties to reach an agreement.
- Megan's Law** A law requiring public availability of location of sex offenders.
- menace** Threat of confinement of a person, detention of property, or injury to a person or property. Menace makes a contract voidable at the option of the injured party.
- mental capacity** Being of sound mind.
- merger** The joining of a lesser right with a greater right so that the lesser right is lost. When a dominant tenement owner purchases the servient tenement, the easement is lost by merger. An owner would not have an easement over his own land.
- mineral lease** Lease of the right to extract minerals for the lease period (also oil and gas leases).
- mineral, oil, and gas (MOG) broker** A broker authorized to engage in transactions involving mineral, oil, and gas rights; options; leases; exchanges; and properties.
- mineral, oil, and gas (MOG) permit** A permit formerly issued to a broker who did not have a mineral, oil, and gas license to engage in a mineral, oil, and gas transaction.

misrepresentation A false statement to induce another to act. Unlike fraud, misrepresentation does not require intent. It makes a contract voidable at the option of the injured party.

mobile home A factory-built housing unit that is transported on its own chassis.

MOG See mineral, oil, and gas broker; mineral, oil, and gas permit.

mortgage A two-party instrument that creates a lien on real estate. The mortgagor (the borrower) gives a lien to the mortgagee (the lender).

mortgagee The lender under a mortgage.

Mortgage Forgiveness Debt Relief Act of 2007 Provides that debt forgiveness will not be taxed as a gain to debtor for principal residence of debtor.

Mortgage Loan Disclosure Statement California disclosure of loan terms by mortgage loan brokers.

mortgage loan originator (MLO) Someone who, for compensation or gain, takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan (Title V of P.L. 110-289).

mortgagor The borrower under a mortgage. The mortgagor gives the lien to the mortgagee.

mutual consent The meeting of the minds required for a binding contract.

mutual mistake A mistake by both parties to an agreement. A mutual mistake as to fact allows a mistaken party to void the contract.

National Environmental Policy Act This act requires an environmental impact statement on federal projects that could significantly affect the environment.

Nationwide Mortgage Licensing System and Registry A uniform system for license applications and reporting requirements for all loan originators established by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators.

Natural Hazards Disclosure Statement Indicates if a property is in a special flood hazard area, an area of potential flooding, a very high fire hazard severity zone, a wildlife area that may contain substantial fire risks and hazards, an earthquake fault zone, or a seismic hazard zone.

natural monument A point or boundary in a metes-and-bounds description that is natural, such as a rock, tree, or river, as opposed to an artificial monument, such as a road, iron stake, wall, et cetera.

navigable Waters capable of being used for commerce.

negative covenants Promises not to do something, such as a prohibition against any detached garages or sheds.

negative declaration Declaration by developer that a project will not have an adverse effect on the environment.

negative easement An easement that prohibits the servient tenement owner from a use. An example would be a building height restriction so the dominant tenement owner retains a view.

- negotiable instruments** Written, signed, unconditional promises or orders to pay to bearer or a payee a sum certain in money now or at a definite time in the future.
- net listing** A listing whereby the agent receives all money received over a net price as his commission.
- no deal–no commission** A listing requiring that escrow actually be closed and title transferred before the agent is entitled to a commission.
- nominal damages** Damages awarded in a token dollar amount for a wrongful act where no actual loss occurred.
- nonconforming uses** Existing uses that are not in conformance with the zoning.
- noncumulative zoning** Zoning that allows only the stated use and not more restrictive uses, as well.
- nondisturbance clause** An agreement where the mortgagee agrees to honor the tenant's lease in the event that the prior mortgage (trust deed) is foreclosed.
- nonfreehold estates** Less-than-freehold interests; leasehold estates.
- nonresident licensee** A licensee who is a resident of a state other than California.
- notice of cessation** A notice that, when recorded, gives subcontractors 30 days to file their liens and the prime contractor 60 days.
- notice of completion** A notice that, when recorded, gives subcontractors 30 days to file their liens and the prime contractor 60 days.
- notice of default** Notice given to interested parties of the default of the trustor.
- notice of delinquency** Notice requested by junior creditor of delinquency of a priority lien.
- notice of nonresponsibility** A notice by an owner, or a vendor under a real property sales contract, that the owner will not be liable for work on the property authorized by a tenant or vendee under a real property sales contract. The notice must be recorded and posted in a timely manner to protect the property from mechanics' liens.
- novation** A substitution of a party to a contract or the substitution of one agreement for another.
- nuisance** An act that disturbs the use or enjoyment of the property of another.
- obligatory advances** Advances that the lender is obligated to make to the borrower; e.g., progress payments on a construction loan.
- Omnibus Nondiscrimination Act** California act that makes every California nondiscrimination act consistent with the California Fair Employment and Housing Act regarding protected groups.
- open listings** Nonexclusive right-to-sell listings.
- opinions of title** Opinions of the marketability of a title given by an attorney based on the abstract of title.

- option** An irrevocable right given to one party to bind another party to an agreement if the party wishes to do so.
- optional advances** Advances on a loan that the lender is not obligated to make.
- option listing** A listing combined with an option of the agent to purchase the property.
- order paper** A negotiable instrument payable to the order of a named party.
- or more clause** A clause that allows debtor to increase payments without prepayment penalties.
- ostensible agency** An agency created by implication when the principal intentionally, or by want of ordinary care, causes a third person to believe another person is the agent of the principal, although no actual agency exists.
- parol evidence rule** The general rule that verbal evidence cannot be used to modify a clearly written contract.
- partial zoning** Zoning that does not take into consideration its effect on other areas.
- partially amortized loan** A loan in which payments fail to liquidate a loan by the due date, resulting in a final balloon payment.
- partition action** A legal action to break up a joint ownership.
- partnership** Two or more people associated to carry on a business and to share in the profits.
- party wall** A wall established by agreement for the common benefit of adjacent owners.
- patents** Original conveyances of land from the government.
- patent defects** Defects that would be obvious from a reasonable inspection of the property.
- per stirpes** Inheritance by right of representation. Children share equally in the share their deceased parent would have taken.
- periodic tenancy** A leasehold interest from period to period that automatically renews itself unless a notice to terminate is given.
- permanent trespass** A continuing trespass, such as an encroachment.
- personal defenses** Defenses the maker of an instrument would have against the payee.
- personal property** Chattels.
- planned unit development (PUD)** Ownership of the individual unit and land under it by the unit owner, plus common areas owned in common with others.
- police power** The power of the government to regulate use for health, safety, morals, and general welfare.
- power of attorney** A written agency agreement whereby a principal appoints an attorney-in-fact as an agent.
- predatory lending** Unfair and costly lending practices that strip homeowners of their equity and often result in foreclosures.

- Preemption Act** A federal act that gives purchase preference to occupants of land.
- preliminary notice** A notice must be given by a lien claimant that the work is subject to a mechanic's lien if a lien is to be obtained. The notice covers work subsequent to the notice and up to 20 days before the notice.
- preliminary public report** Under the Subdivided Lands Law, the preliminary public report can be issued before the public report. The preliminary public report allows the subdivider to take reservations but not to sell parcels.
- preliminary title report** A report of the condition of title given by a title insurer before issuance of a title policy. The preliminary title report does not provide any insurance of title.
- prepayment penalty** Payment penalty for paying an obligation before it is due.
- presumption** A legal inference, which can be overcome by evidence to the contrary.
- principal** The employer of an agent for whom the agent acts.
- private easement** An easement given to specific property or people.
- private nuisance** A nuisance that is limited in scope. A private nuisance does not affect the entire community or neighborhood.
- privity of contract** The relationship between contracting parties.
- probate** The legal procedure to carry out the wishes of the deceased and pay her debts.
- procuring cause** That cause that initiated an uninterrupted chain of events that led to a sale.
- promissory note** A two-party instrument whereby a maker unconditionally promises to pay a payee a certain sum of money now or at a definite time in the future.
- promotional note** A subordinate promissory note on real estate for a term of three years or less issued to finance improvements before the first sale (subdivision).
- Proposition 99** (Homeowner and Private Property Protection Act) prohibits the taking of private property by eminent domain when the intention is to turn the property over to a private party rather than take it for public use.
- publication period** The 20-day period before a trustee's sale during which the notice of the sale is published.
- public easement** An easement given to the general public.
- public nuisance** A use that disturbs the use and enjoyment of an entire neighborhood or community.
- public report** A disclosure statement required under the Subdivided Lands Law. Purchasers are not obligated until they have read the report and signed a receipt.
- puffing** Statements of opinion (not fact) that involve information that a consumer would not rely upon in making a purchase.
- punitive damages** See exemplary damages.

- pur autre vie** A life estate given for the life of someone other than the life tenant.
- qualified endorsement** An endorsement on a note “without recourse.” The endorser will not be liable if the maker dishonors the note.
- quasi contract** A contract implied by law, as a matter of equity, when no actual contractual agreement took place.
- quiet enjoyment** An implied warranty that the landlord will not interfere with the tenant’s reasonable use and enjoyment of the premises.
- quiet title** Legal action to determine ownership or rights in real property.
- quitclaim deed** A deed that conveys whatever interest the grantor has without claiming any specific interest.
- race of the diligent** Recording priority based on date and time of recording.
- ratification** Approval of an agreement to which the approving party was not legally bound. By ratification, the party agrees to be bound by the agreement.
- real defenses** Defenses that could be raised against a holder in due course.
- Real Estate Advisory Commission** An advisory group consisting of six brokers and four public members that advises the real estate commissioner.
- real estate commissioner** Executive officer of the Bureau of Real Estate, who is appointed by the governor.
- real estate investment trust (REIT)** A trust organized under federal law and having at least 100 investors. Ownership interest is in the form of certificates or shares that are freely transferable.
- Real Estate Settlement Procedures Act (RESPA)** A federal loan disclosure act applicable to federally related first mortgages and trust deeds.
- real property** Land and those appurtenances that go with the land.
- real property sales contract (land contract)** Contract whereby seller retains title and the buyer is given possession.
- real property securities** Securities with guaranteed yields, promotional notes, and designated by Article 6 of the real estate law to be real property securities. (Repealed)
- real property securities dealer** A broker whose license has been endorsed to sell real property securities.
- real property securities dealer statement** A disclosure statement issued to purchasers of real property securities.
- Realtist** A member of the National Association of Real Estate Brokers (NAREB).
- REALTOR®** A member of the National Association of REALTORS® (NAR).
- rebate law** Law that prohibits escrows and title insurers from giving rebates or favorable treatment as consideration for the referral of business.
- recording** Making an interest public knowledge by recording the interest with a county recorder. Recording provides constructive notice of the interest.
- recreational user immunity** Immunity of owners for liability to injury to others who enter property for recreational use. It does not apply to failure to warn as to dangerous conditions.

- redlining** Refusal to loan (or insure) within an area.
- reformation** A court action to reform a contract to read as it was intended to read.
- regulatory law** The rules and regulations enacted by government agencies.
- relation-back doctrine** The doctrine that a buyer's rights relate back to the delivery of the deed into escrow regarding intervening liens of a party who had knowledge or notice of the escrow.
- reliction** Rights of property owners bordering on lakes or seas to the land increase when the water recedes.
- remainder interest** An interest that goes to other than the original grantor upon some event, generally the death of a life tenant.
- rent control** Ordinances that limit the rent a lessor can charge for premises, as well as other lessor rights.
- rent skimming** Collecting rent and not using it to make mortgage payments or collecting rent on property not owned or controlled by the renter.
- request for notification of default** A recorded request by a junior lienholder to be informed if the trustor is given a notice of default.
- rescission** Setting a contract aside and returning the consideration given.
- reservation in a deed** The retention of a right, such as an easement, in the grantor.
- respondeat superior** The doctrine that the master is liable for the acts of his servants (applies to agency and employment relationships).
- restraint against alienation** A restriction on the power to convey property.
- restricted license** Probationary real estate license granted after a license was revoked, suspended, or denied.
- retaliatory evictions** Evictions because of a tenant's complaints to landlord or a public agency about defects or for lawfully organizing a tenant association. Landlord cannot decrease services, increase rent, or evict within 180 days of tenant's exercising any of these rights.
- reversionary interest** An interest that returns to the grantor, or her heirs upon some event, such as the death of a life tenant.
- rezoning** A change in the zoning.
- right of correlative use** The right of a landowner to the reasonable use of the underground percolating water.
- right of first refusal** Right given to a party to meet the price and terms of a third party if the owner decides to sell.
- right of prior appropriation** A concept in California and other states that the first user of riparian water obtains priority over later users.
- right of redemption** The redemption right of the mortgagor after a foreclosure sale.
- riparian rights** Right of a landowner to water flowing through, under, or adjacent to his property.
- rule against perpetuities** The rule that an estate must vest in an owner within the life of a person in being plus 21 years and a gestation period.

Rumford Act California's fair housing law.

SAFE Act The Secure and Fair Enforcement for Mortgage Licensing Act. Requires a licensing system for mortgage originators.

safety clause A clause in a listing that provides that should the seller sell to a person the agent negotiated with within a set period of time after the listing expires, and whose name the agent submitted to the owner in writing before expiration, the broker will be entitled to the sale commission.

salesperson A real estate licensee who must be employed by a licensed broker.

satisfaction of mortgage Instrument given by the mortgagee to the mortgagor that releases the mortgage lien when recorded.

S corporation A small corporation whose earnings are taxed as a partnership rather than as a corporation.

secret agent—undisclosed agent The third party can hold the agent or undisclosed principal liable.

secret profit A profit of the agent that was not fully disclosed to the principal.

security agreement An instrument that creates a security interest in personal property.

security deposit A deposit for the last month's rent or to secure against tenant damage that must be refundable.

seal A mark or impression to attest to authenticity of a signature. Not required in California.

self-help eviction A nonlegal act by the lessor to force the tenant to vacate.

send-out slip An agreement that if a property is disclosed, the prospective buyer will negotiate for it only through the broker who made the disclosure.

separate property Property owned by a spouse in severalty rather than jointly with the other spouse.

servient tenement The land being used by another under an easement.

severalty Ownership in severalty is ownership by one individual or corporation alone.

severance damage Damage to the remainder of the property resulting from the taking of a portion by eminent domain.

sexual harassment Offensive sexually, related actions or language that could constitute a tort and/or discriminatory act.

sheriff's deed A deed given after a sheriff's sale.

simultaneous death When parties die in the same accident and it is unclear which one died first, they are presumed to have died at the same time. Each estate will be probated as if that person had survived the other.

small claims court (California) A division of the superior court. Jurisdiction is limited to \$5,000 or less.

Solar Shade Act An act providing an easement of light after a person has installed a solar collector.

- Soldiers and Sailors Civil Relief Act** An act that prohibits foreclosures while a person is in military service and within three months thereafter except by court order.
- special agent** An agent whose authority is limited to specified duties.
- special assessments** Tax assessments for improvements, such as streets and sewers. Liens for special assessments are priority liens.
- special endorsement** An endorsement on a negotiable instrument to a named party.
- special-use permit** See conditional-use permit.
- specific lien** A lien against particular property only, such as a trust deed, mechanic's lien, or tax lien.
- specific performance** Requiring a person to perform as she agreed to perform.
- spite fence** A fence over 10 feet in height maliciously erected or maintained to annoy a neighbor; a spite fence is considered a nuisance.
- spot zoning** Zoning of parcels not in conformance with the general area zoning.
- standard policy of title insurance** A policy of title insurance that covers matters of record not specifically excluded, as well as forgery, lack of capacity of a grantor, undisclosed spousal interests, failure of delivery, federal estate tax liens, corporation deeds when a charter has expired, and deeds of agents whose capacity has ended.
- standard subdivision** Subdivision that does not contain any common areas.
- stare decisis** Principle that previous decisions should be used to determine present rights and obligations.
- statute of frauds** The requirement that certain agreements must be in writing to be enforceable (adopted from the common law).
- statute of limitations** The period in which legal action must be started or the right to bring action is lost.
- statutory law** Law that is based on enacted statutes rather than precedent; civil law.
- steering** Directing prospective buyers to areas based on race, religion, national origin, etc.
- stock cooperative** Corporate ownership of real property with each shareholder entitled to occupancy of a unit under a lease.
- stop notice** A notice to a lender that a mechanic has not been paid. Unless a bond is posted, the lender must withhold monies due to the prime contractor.
- straight note** A note whereby interest only is paid and the entire balance is due on the due date.
- strict foreclosure** Common law foreclosure whereby the mortgagee receives the property without a sale upon the mortgagor's default.
- strict liability** Liable for injury occurring without regard to negligence or fault.
- subagent** Agent appointed by an agent. Subagents have agency duties to the principal.

- Subdivided Lands Law** A disclosure law to protect purchasers of subdivided parcels. A public report is required for subdivisions of five or more parcels.
- Subdivision Map Act** An act providing local control of the physical aspects of land divisions.
- subjacent support** Support from below that an excavator must provide.
- subject to** Purchasing a property without agreeing to pay encumbrances. If there is a default, no deficiency judgment is possible.
- sublease** A lease given by the original lessee (sublessor) to a sublessee. The sublessee is the tenant of the sublessor and not the original lessor.
- subordination clauses** Clauses that make a mortgage or trust deed secondary to a later recorded mortgage or trust deed.
- subrogation** Substitution of one person's rights for another's. When an insurer pays a claim of the insured, the insurer can sue the party who caused the damage. The insurer has the insured's rights by subrogation.
- substantial performance** Inadvertent, minor variance from the required performance.
- successive estates** Estates established to succeed other estates, such as a remainder estate to follow a life estate.
- successor liability** Liability of business purchaser for unpaid sales tax of prior owner.
- superior court (California)** Court of original jurisdiction for matters over \$25,000, as well as appellate jurisdiction from the municipal court.
- supreme court (California)** Appellate jurisdiction over all California courts.
- Supreme Court (U.S.)** Discretionary appellate jurisdiction from federal courts, as well as state courts if a federal issue is involved.
- surrender** The giving up of leasehold rights by a tenant in exchange for being released from future obligations under the lease.
- survivorship** Right of the surviving joint tenant(s) to interests of another joint tenant on the latter's death.
- syndicate** A limited partnership.
- tacking on** Allowing successors in interest to add on their adverse use in obtaining the five years necessary for an easement by prescription or title by adverse possession.
- tax deed** A deed given at a tax sale.
- tax liens** Liens for property taxes are specific priority liens against the property assessed. Liens for state and federal income tax are general liens against the property of the taxpayer.
- tenancy at sufferance** The tenancy of a holdover tenant. The lessor can treat such a tenant as a trespasser.
- tenancy at will** A tenancy at the pleasure of the lessor.
- tenancy by the entirety** Not used in California, it is a joint tenancy between spouses where neither spouse can separately convey his or her interest.

tenancy for years A tenancy for a definite period of time. The tenancy does not renew automatically, and the tenant must give up possession at the end of the lease unless an extension to the lease or a new lease is agreed on.

tenancy in common Undivided interest in property without the right of survivorship.

tender An offer of money or full performance of an agreement without any conditions.

tentative map Initial map filed by a subdivider under the Subdivision Map Act. When all approvals and changes are made, the final map is recorded.

termination statement A statement that, when filed, releases the lien of the financing statement.

testator A person who died having a will.

third-party beneficiary A person, not a party to a contract, who was the intended beneficiary of the contract and therefore has a standing to sue if the contract is breached.

30-day notice A notice to vacate under a periodic tenancy. Notice must be for the length of the rent-paying period, but need not be for more than 30 days.

three-day notice A notice to quit, quit or pay rent, or quit or cure that must be given before an unlawful detainer action.

tidelands Land between ordinary high and low tides.

tie-in agreement Requirement that a party agree to another nonrelated transaction as a condition of purchase or sale (Sherman Act violation).

“time is of the essence” A statement in a contract that requires performance within the stated time period if the other party is to be bound by the agreement.

time-share Fractionalized ownership whereby each owner has exclusive right of occupancy for an agreed-on period of time.

title insurance A policy that insures the marketability of title. The insurance contract indemnifies the insured against losses not excluded by the policy, up to the policy amount.

title plant The title records of a title insurer to determine marketability of title.

title theory (mortgage) The theory in some states that a mortgage transfers title to the mortgagee as security for the loan.

tort A civil wrong or violation of a duty.

trade fixtures Fixtures installed by a tenant for the purpose of conducting a business or trade. The trade fixture remains personal property and can be removed by the tenant.

Transfer Disclosure Statement Requires seller disclosures for residential sales.

Treaty of Guadalupe Hidalgo Treaty ending the Mexican-American War whereby the United States agreed to honor property rights of Mexican citizens, which included the community property concept.

- trespass** Unlawful entry of, or injury to, the property of another.
- trust deed** A three-party security transaction in which the trustor (borrower) gives a note to the beneficiary (lender) and a title (trust deed) to a trustee as security for the note.
- trustee** The third party holding naked legal title for security purposes under a trust deed.
- trustee sale** Sale by the trustee when the trustor defaults. A trustee's deed is given to the purchaser.
- trustee's deed** Deed given by trustee to purchaser after trustee's sale.
- trustor** The buyer or borrower under a trust deed.
- Truth in Lending Act** A disclosure law that informs borrowers of credit costs. It provides a right of rescission when credit is secured by a borrower's residence.
- Truth in Savings Act** Requires lender disclosure of costs and annual percentage yield.
- undivided interest subdivision** A development where the entire subdivision is owned in common for use of all owners with no separate exclusive use rights.
- undue influence** Improper influence so that a person really is not acting under his own free will. Such influence makes a contract voidable.
- Uniform Electronic Transactions Act (UETA)** Sets forth rules for entering into an enforceable contract using electronic means.
- uniform laws** Laws drafted by the National Conference of Commissioners on Uniform State Laws to provide uniformity for commercial purposes.
- Uniform Vendor and Purchaser Risk Act** Sets forth who bears risk of loss in purchase situations.
- unilateral contract** An offer that is accepted through performance rather than a mutual promise.
- unilateral mistake** A mistake by only one party to a contract. It does not void the agreement.
- unincorporated association** Nonprofit association.
- unlawful detainer action** A legal eviction action. The tenant must appear and answer charges within five days of service.
- Unruh Civil Rights Act** The act that prohibits businesses from discriminating.
- upzoning** Change in zoning allowing less-restrictive development, such as more units or more intensive use.
- usury** An illegally high rate of interest.
- valid** Good and enforceable.
- variance** A special exception to the zoning generally granted to avoid hardship.
- vendee** Buyer on a real property purchase contract.
- vendor** Seller on a real property purchase contract.
- venue** The proper place for a lawsuit to be filed.
- verification** Swearing under oath as to the truthfulness of a statement.

- vested remainder** A certain interest after a life tenant dies.
- vicarious liability** Liability of an individual for acts of one acting in his behalf.
- voidable contract** A contract whereby one party only can declare the contract void.
- void contract** A contract that has no effect.
- waiver** Voluntary relinquishment of a right. A person can waive rights that are for her sole benefit. Failure to insist on proper performance could be a waiver of the right to the required performance.
- warranty deed** A deed in which the grantor warrants good title.
- waste** Unreasonable and destructive use of property.
- wild document** A recorded instrument outside the chain of title that fails to give constructive notice.
- will** A testamentary instrument.
- wraparound loan** A loan written for the amount of an existing loan, as well as an additional amount, usually used by sellers to take advantage of a low-interest existing loan.
- wraparound trust deed (all-inclusive deed of trust)** A trust deed written for the amount of the existing encumbrances plus the seller's equity.
- writ of execution** A court writ directing the sheriff to seize and sell property of a debtor to satisfy the claim of the judgment creditor.
- writ of possession** A court order for the tenant to vacate.
- zoning** Public control of land use enacted under police power for the health, safety, morals, and general welfare of the community.

INDEX OF CASES*

*Cross-Indexed Plaintiff-Defendant

6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 C.A.4th 1279, 364
162 North Wolfe, LLC. *See* Hoffman v. 162 North Wolfe, LLC
564 acres of land. *See* U.S. v. 564 acres of land
616 Croft Ave LLC v. City of West Hollywood (2016) 3 C.A.5th 621, 444
967.905 acres of land. *See* U.S. v. 967.905 acres of land
1333 N. California Blvd. *See* Nippon Credit Bank v. 1333 N. California Blvd.
3814 N.W. Thurman St. *See* U.S. v. 3814 N.W. Thurman St.

A

Ability Center of Greater Toledo v. James E. Moline Builders, Inc. (2020) 478 F. Supp. 3d 606, 126
Ach v. Finkelstein (1968) 264 C.A.2d 667, 45
Adamson. *See* City of Santa Barbara v. Adamson
Adamson Cos. *See* Sprecher v. Adamson Cos.
Aerojet General Corp. *See* Mangini v. Aerojet General Corp.
Aguayo v. Amaro (2013) 213 C.A. 4th 1102, 310
Alamo School District v. Jones (1960) 182 C.A.2d 180, 244
Alatrisme v. Cesar's Exterior Designs (2010) 183 C.A. 4th 656, 386
Aldridge. *See* No GWEN Alliance v. Aldridge
Alexander v. McKnight (1992) 7 C.A.4th 973, 85
Ali v. City of Los Angeles (1999) 77 C.A.4th 246, 444
Allen. *See* Smith v. Allen
Allred v. Harris (1993) 14 C.A.4th 1386, 21

Allstate Ins. Co. v. County of Los Angeles and Security Pac. Nat'l Bank v. County of Los Angeles (1984) 161 C.A.3d 877, 241
Alpha Property Management. *See* Amos v. Alpha Property Management
Altus Bank v. State Farm Fire and Cas. Co. (1991) 758 F. Supp. 567, 339
Alvarado. *See* Emeric v. Alvarado
Amaro. *See* Aguayo v. Amaro
American Mortgage Company. *See* Phelps v. American Mortgage Company
American Savings. *See* Gibbs v. American Savings
Amos v. Alpha Property Management (1999) 73 C.A.4th 895, 508
Anderson v. Reynolds (1984) 588 F. Supp. 814, 307
Andrade Development Co. v. Martin (1982) 138 C.A.3d 330, 292
Andrews v. Mobile Aire Estates (2004) 125 C.A.4th 578, 508
Annel Management Co. *See* Tan v. Annel Management Co.
Annicelli v. Town of South Kingston, R.I. (1983) 463 A.2d 133, 441
Annocki v. Peterson Enterprises, LLC (2014) 232 C.A. 4th 32, 284
Anthony v. Enzler (1976) 61 C.A.3d 872, 195
Appellate Dept. *See* Randone v. Appellate Dept.
Armenta v. Edmonds (1988) 201 C.A.3d 464, 134
Armitage v. Decker (1990) 218 C.A.3d 887, 392
Arrospide. *See* Carboni v. Arrospide
ARYA Group, Inc. v. Cher (2000) 77 C.A.4th 610, 167
Assilzadeh v. California Federal Bank (2000) 82 C.A.4th 399, 86
Associated Homebuilders Inc. v. City of Livermore (1976) 18 C.3d 582, 418
Asuncion. *See* People v. Asuncion

Auburn Woods I Homeowners Association v. Fair Employment and Housing Council (2004) 121 C.A.4th 1578, 120
Autopsy/Post Services, Inc. v. City of Los Angeles (2005) 129 C.A. 4th 521, 424
AVCO Community Developers Inc. v. South Coast Regional Commission (1976) 17 C.3d 785, 437
Avenida San Juan Partnership v. City of Santa Clemente (2011) 201 C.A.4th 1256, 422
AVNER v. Longridge Estates (1982) 272 C.A.2d 607, 438
Axley v. Transamerica Title Ins. Co. (1978) 88 C.A.3d 1, 466
Ayres. *See* Fair Housing Council of Orange County Inc. v. Ayres

B

Bacal. *See* Sanowicz v. Bacal
Baker v. Hubbard (1980) 101 C.A.3d 226, 377, 385
Baldwin Park Redev. Agency v. Irving (1984) 156 C.A.3d 428, 322
Balistreri v. Nevada Livestock Prod. Credit Ass'n (1989) 214 C.A.3d 635, 174
Ballou v. Masters Props. No. 6 (1987) 189 C.A.3d 65, 85
Ball v. Steadfast—BLK. (2011) 196 C.A. 4th 694, 386
Baltimore County. *See* Greater Baltimore Board of REALTORS® v. Baltimore County
Bank of America. *See* Montgomery v. Bank of America
Bank of America. *See* Wellenkamp v. Bank of America
Bank of America v. Daily (1984) 152 C.A.3d 767, 344
Bank of Stockton v. Church of Soldiers of the Cross of Christ (1996) 44 C.A.4th 1623, 5
Banville v. Schmidt (1974) 37 C.A.3d 92, 50

- Barberi v. Rothchild (1939) 7 C.2d 537, 362
- Barber v. Chang (2007) 151 C.A. 4th 1456, 489
- Bardis v. Oates (2004) 119 C.A.4th 1, 291
- Bardos. *See* Twentynine Palms Enterprises Corporation v. Bardos
- Barela v. Superior Court (1981) 30 C.3d 244, 505
- Barham. *See* Beverly Way Associates v. Barham
- Barnes v. Black (1999) 71 C.A.4th 1473, 487
- Barry. *See* Ingwersen v. Barry
- Barry v. Raskov (1991) 232 C.A.3d 447, 57
- Bate v. Marsteler (1959) 175 C.A.2d 57, 49
- Baychester Shopping Center, Inc. v. San Francisco Residential Rent Stabilization and Arbitration Board (2008) 165 C.A.4th 1000, 509
- Bay Counties Title Guaranty Co. *See* Kish v. Bay Counties Title Guaranty Co.
- BD Inns v. Pooley (1990) 218 C.A.3d 289, 16, 163
- Beach 'N' Bay Realty Inc. *See* Jorgensen v. Beach 'N' Bay Realty Inc.
- Becker v. Lindsay (1976) 16 C.3d 188, 386
- Beckwith. *See* Otay Water District v. Beckwith
- Behniwal v. Mix (2005) 133 C.A.4th 1027, 31
- Bel Air Country Club. *See* MacDonald Properties Inc. v. Bel Air Country Club
- Beliveau v. Caras (1995) 873 F. Supp. 1393, 129
- Berghold. *See* VanKlompberg v. Berghold
- Bernardo Vilas Mgmt. Corp. v. Black (1987) 190 C.A.3d 153, 443
- Berns. *See* Orlando v. Berns
- Bernstein. *See* United Multiple Listing Service v. Bernstein
- Best. *See* Ilkhchooyi v. Best
- Beverly Way Associates v. Barham (1990) 226 C.A.3d 49, 220
- Big Boy Restaurants of America. *See* Ursino v. Big Boy Restaurants of America
- Bihr. *See* Fry v. Bihr
- Birkenfield v. City of Berkeley (1976) 17 C.3d 129, 501
- Bisetti v. United Refrigeration Corp. (1985) 174 C.A.3d 643, 291
- Bisno v. Santa Monica Rent Control Board (2005) 130 C.A. 4th 816, 503
- Black. *See* Black v. Black
- Black. *See* Bernardo Vilas Mgmt. Corp. v. Black
- Black. *See* Barnes v. Black
- Black v. Black (1949) 91 C.A.2d 328, 261
- Blank v. Borden (1974) 11 C.A.3d 963, 230
- Boarts v. Imperial Irrigation District (1947) 80 C.A.2d 574, 408
- Boething Treeland Farms Inc. *See* Shipman v. Boething Treeland Farms Inc.
- Booska v. Patel (1994) 24 C.A.4th 1786, 393
- Borden. *See* Blank v. Borden
- Borelli v. Brusseau (1993) 12 C.A.4th 647, 174
- Borough of Metuchen. *See* United Advertising Corp. v. Borough of Metuchen
- Boustred. *See* Melton v. Boustred
- Boxer v. City of Beverly Hills (2016) 246 C.A. 4th 1212, 410
- Brandt v. Fox (1979) 90 C.A.3d 737, 133
- Brenlar. *See* Strebel v. Brenlar
- Brewer v. Murphy (2008) 161 C.A. 4th 928, 409
- Bridgeport Community Association. *See* Martin v. Bridgeport Community Association
- Britton. *See* Foster v. Britton
- Broadmoor San Clemente Homeowners Assn. v. Nelson (1994) 25 C.A.4th 1, 444
- Brown. *See* Green v. Brown
- Brown. *See* Hubbard v. Brown
- Brown. *See* Robinett v. Brown
- Brown v. FSR Brokerage, Inc. (1998) 62 C.A.4th 766, 32
- Brown v. Gordon (1966) 240 C.A.2d 659, 94
- Brown v. Green (1994) 8 C.4th 812, 493
- Brown v. Sweet (1928) 95 C.A. 117, 301
- Brunelle v. Signore (1989) 215 C.A.3d 122, 285
- Brusseau. *See* Borelli v. Brusseau
- BT-1 v. Equitable Life Assurance Society (1999) 75 C.A.4th 1406, 274
- Buck. *See* Merrill v. Buck
- Burgess v. Rodom (1953) 121 C.A.2d 71, 173
- Burke. *See* Scher v. Burke
- Burnand v. Irigoyen (1947) 30 C.2d 861, 173
- Burnett v. Chimney Sweep, LLC (2004) 123 C.A.4th 1057, 477
- Butte Creek Island Ranch v. Crim (1982) 136 C.A.3d 360, 291
- Byers. *See* People v. Byers

C

- Cadam v. Sumerset Garden Townhouse HOA (2011) 200 C.A.4th 383, 294
- Cadlerock Joint Ventures, LP v. Lobel (2012) 206 C.A.4th 1531, 364
- Caldwell. *See* First National Bank of La Habra v. Caldwell
- Calif. Dept. of Real Estate. *See* Rodriguez v. Calif. Dept. of Real Estate
- California Building Industry Assn. v. City of San Jose (2015) 61 C.A. 4th 435, 421
- California Center for the Arts, Escondido. *See* Lentini v. California Center for the Arts, Escondido
- California Coastal Commission. *See* Feduniak v. California Coastal Commission
- California Coastal Commission. *See* Nolan v. California Coastal Commission
- California Coastal Commission. *See* Ocean Harbor House Homeowners Association v. California Coastal Commission
- California Coastal Common. *See* Grupe v. California Coastal Common
- California Department of Real Estate. *See* Donaldson v. California Department of Real Estate
- California Federal Bank. *See* Assilzadeh v. California Federal Bank
- California Federal Bank v. Matreyek (1992) 8 C.A.4th 125, 363

- California Mobile Home Park Management Co. *See* U.S. v. California Mobile Home Park Management Co.
- California National Bank v. Woodridge Plaza LLC (2208) 164 C.A. 4th 137, 508
- California Realty. *See* Lundy v. California Realty
- California Western School of Law. *See* Donnell v. California Western School of Law
- Calva. *See* Espinoza v. Calva
- Calvo. *See* Kurtz v. Calvo
- Camacho v. Shaefer (1987) 193 C.A.3d 718, 494
- Capital Growth Investors XIV. *See* Harris v. Capital Growth Investors XIV
- Caras. *See* Beliveau v. Caras
- Carboni v. Arrospide (1991) 2 C.A.4th 76, 109
- Carleton v. Tortosa (1993) 14 C.A.4th 745, 61
- Carter. *See* Sierra Pacific Industries v. Carter
- Carty v. Ojai (1978) 77 C.A.3d 329, 442
- Castaneda v. Olsher (2007) 41 C. 4th 1205, 490
- Castner v. City of Oakland (1982) 129 C.A.3d 94, 442
- Causby. *See* U.S. v. Causby
- C.B. Ellis, Inc. v. Terra Nostra Consultants (2014) 230 C.A.4th 405, 294
- Century 21 Klowden-Forness Realty. *See* Field v. Century 21 Klowden-Forness Realty
- Cerda. *See* Sanders Construction Co. v. Cerda
- Cesar's Exterior Designs. *See* Alatrisme v. Cesar's Exterior Designs
- Chambers. *See* Riley v. Chambers
- Chang. *See* Barber v. Chang
- Channing Properties v. City of Berkeley (1993) 11 C.A.4th 88, 502
- Chan v. Tsang (1991) 1 C.A.4th 1578, 231
- Chen v. Kraft (2016) 24 C.4th 13, 496
- Cher. *See* ARYA Group, Inc. v. Cher
- Chevron U.S.A. Inc. *See* Lingle v. Chevron U.S.A. Inc.
- Chevron U.S.A., Inc. *See* Ellis v. Chevron U.S.A., Inc.
- Chicago Metallic Ceilings Inc. *See* Warsaw v. Chicago Metallic Ceilings Inc.
- Chicago Title. *See* Soifer v. Chicago Title
- Chicago Title Co. *See* Lick Mill Creek Apartments v. Chicago Title Co.
- Chimney Sweep, LLC. *See* Burnett v. Chimney Sweep, LLC
- Christenson v. Commonwealth Land Title Insurance Company (1983) 666 P.2d 302, 455
- Church of Soldiers of the Cross of Christ. *See* Bank of Stockton v. Church of Soldiers of the Cross of Christ
- Citizens Sav. & Loan Assn. *See* South Bay Engineering Corp. v. Citizens Sav. & Loan Assn.
- City and County of San Francisco. *See* Small Property Owners of San Francisco v. City and County of San Francisco
- City and County of San Francisco v. Sainez (2000) 77 C.A.4th 1302, 485
- City Council. *See* Save the Welwood Murray Memorial Library Comm. v. City Council
- City of Berkeley. *See* Birkenfield v. City of Berkeley
- City of Berkeley. *See* Channing Properties v. City of Berkeley
- City of Berkeley. *See* Rue-Ell Enterprises Inc. v. City of Berkeley
- City of Beverly Hills. *See* Boxer v. City of Beverly Hills
- City of Buena Park. *See* Cook v. City of Buena Park
- City of Camarillo. *See* Pardee Construction Co. v. City of Camarillo
- City of Carmel-by-the-Sea. *See* Ewing v. City of Carmel-by-the-Sea
- City of Cleburne v. Cleburne Living Center, Inc. (1985) 473 U.S. 432, 420
- City of Corona. *See* Ebel v. City of Corona
- City of Davis. *See* Friends of Davis v. City of Davis
- City of Goleta. *See* Guggenheim v. City of Goleta
- City of Hanford. *See* Hernandez v. City of Hanford
- City of Indio. *See* Jefferson Street Ventures, LLC v. City of Indio
- City of Ladue v. Gilleo (1994) 114 S. Ct. 2038, 22
- City of Livermore. *See* Associated Homebuilders Inc. v. City of Livermore
- City of Los Angeles. *See* Regency Outdoor Advertising, Inc. v. City of Los Angeles
- City of Los Angeles. *See* Ali v. City of Los Angeles
- City of Los Angeles. *See* Autopsy/Post Services, Inc. v. City of Los Angeles
- City of Los Angeles. *See* Consolidated Rock Products v. City of Los Angeles
- City of Los Angeles. *See* Jones v. City of Los Angeles
- City of Los Angeles. *See* Krater v. City of Los Angeles
- City of Los Angeles. *See* Sylvia Landfield Trust. v. City of Los Angeles
- City of Los Angeles v. Gage (1954) 127 C.A.2d 442, 441
- City of New London. *See* Kelo v. City of New London
- City of Oakland. *See* Castner v. City of Oakland
- City of Oceanside v. McKenna (1989) 215 C.A.3d 1420, 443
- City of Oxnard. *See* Griffin Dev. Co. v. City of Oxnard
- City of Rancho Palos Verdes. *See* Echevarrieta v. City of Rancho Palos Verdes
- City of San Buenaventura. *See* Selby Realty v. City of San Buenaventura
- City of San Diego. *See* College Area Renters and Landlord Association v. City of San Diego
- City of San Diego v. Sobke (1998) 65 C.A.4th 379, 311
- City of San Jose. *See* California Building Industry Assn. v. City of San Jose
- City of Santa Barbara v. Adamson (1980) 27 C.3d 123, 442
- City of Santa Clemente. *See* Avenida San Juan Partnership v. City of Santa Clemente
- City of South Lake Tahoe. *See* Springmeyer v. City of South Lake Tahoe

- City of South San Francisco Housing Authority v. Guillory (1996) 41 C.A.4th 13, 507
- City of Stanton v. Cox (1989) 207 C.A.3d 1557, 425
- City of Tigard. *See* Dolan v. City of Tigard
- City of Turlock v. Paul M. Zagaris Inc. (1989) 209 C.A.3d 189, 183
- City of West Hollywood. *See* 616 Croft Ave LLC v. City of West Hollywood
- City of West Hollywood. *See* Vega v. City of West Hollywood
- City of Yorba Linda. *See* Ross v. City of Yorba Linda
- City Title Insurance Company. *See* Mains v. City Title Insurance Company
- Classen v. Weller (1983) 145 C.A.3d 27, 231
- Cleburne Living Center, Inc. *See* City of Cleburne v. Cleburne Living Center, Inc.
- Clements v. Snider (1969) 409 F.2d 549, 254
- Cline v. Yamaga (1979) 97 C.A.3d 239, 132
- Cloud. *See* U.S. v. Cloud
- Coast Resorts Inc. *See* Long v. Coast Resorts Inc.
- Coast & Southern Federal Savings & Loan Ass'n. *See* Garrett v. Coast & Southern Federal Savings & Loan Ass'n.
- Cobblestone Village Community Rentals LP. *See* Coronado v. Cobblestone Village Community Rentals LP
- Coldwell Banker and Co. v. Pepper Tree Office Center Assocs. (1980) 106 C.A.3d 272, 192
- Coldwell Banker Real Estate Services. *See* Smith v. Coldwell Banker Real Estate Services
- Coldwell Banker Residential Brokerage Co. *See* Horiike v. Coldwell Banker Residential Brokerage Co
- Coldwell Banker Residential Brokerage Co. *See* Jacobs v. Coldwell Banker Residential Brokerage Co
- Coldwell Banker Residential Brokerage Co. Inc. v. Superior Court (2004) 117 C.A.4th 158, 83
- Cole. *See* Cole v. Cole
- Coleman v. Mora (1968) 263 C.A.2d 137, 228
- Cole v. Cole (1956) 139 C.A.2d 691, 290
- College Area Renters and Landlord Association v. City of San Diego (1994) 43 C.A.4th 677, 443
- Collier v. Oelke (1962) 202 C.A.2d 843, 407
- Commonwealth Land Title Ins. Co. *See* Harrison v. Commonwealth Land Title Ins. Co.
- Commonwealth Land Title Insurance Company. *See* Christenson v. Commonwealth Land Title Insurance Company
- Community Bank. *See* Little v. Community Bank
- Connolly v. McDermott (1984) 162 C.A.3d 973, 401
- Consolidated Rock Prods. *See* New v. Consolidated Rock Prods.
- Consolidated Rock Products v. City of Los Angeles (1962) 57 C.2d 515, 441
- Contemporary Invs., Inc. v. Safeco Title Ins. Co. (1983) 145 C.A.3d 999, 465
- Contractors Dump Truck Service Inc. v. Gregg Construction Co. (1965) 237 C.A.2d 1, 385
- Cooke v. Ramponi (1952) 38 C.2d 282, 406
- Cook v. City of Buena Park (2005) 126 C.A.4th 1, 22
- Cooper. *See* Madhani v. Cooper
- Cordano v. Wright (1911) 159 C. 610, 302
- Cornelison v. Kornbluth (1975) 15 C.3d 590, 345
- Coronado v. Cobblestone Village Community Rentals LP (2008) 163 C.A. 4th 831, 127
- County of Alameda. *See* Seatrain Terminal of California, Inc. v. County of Alameda
- County of DuPage. *See* Hope v. County of DuPage
- County of Los Angeles. *See* Specialty Restaurants Corp. v. County of Los Angeles
- County of Riverside. *See* Deckert v. County of Riverside
- Cournale. *See* Ford v. Cournale
- Cowert. *See* Larkin v. Cowert
- Cox. *See* City of Stanton v. Cox
- Crawford v. Nastos (1960) 182 C.A.2d 659, 231
- Creative Capital Leasing Group LLC. *See* Schaffter v. Creative Capital Leasing Group LLC
- Cregg v. Ministor Ventures (1983) 148 C.A.3d 110, 505
- Cridlebaugh. *See* White v. Cridlebaugh
- Crigler. *See* Walker v. Crigler
- Crim. *See* Butte Creek Island Ranch v. Crim
- Crogran v. Metz (1956) 47 C.2d 398, 49
- C.R. Oosterbaan et al. *See* Storage Services v. C.R. Oosterbaan et al.
- CTC Real Estate Services v. Lepe (2006) 140 C.A. 4th 856, 344
- Cuddy. *See* Scheerer v. Cuddy
- Cunningham v. Security Title Ins. Co. (1966) 241 C.A.2d 626, 466
- Cunningham v. Superior Court (1998) 67 C.A.4th 743, 279

D

- Daily. *See* Stone v. Daily
- Daily. *See* Bank of America v. Daily
- Davi. *See* Robbins v. Davi
- Davis v. Gomez (1989) 207 C.A.3d 1401, 489
- Decker. *See* Armitage v. Decker
- Deckert v. County of Riverside (1981) 115 C.A.3d 885, 408
- de la Cuesta. *See* Fidelity Federal Savings & Loan v. de la Cuesta
- De La Mater. *See* O'Meara v. De La Mater
- Delis. *See* Hinson v. Delis
- Del Monte Beverage Co. *See* Nesbitt Fruit Products Inc. v. Del Monte Beverage Co.
- Del Taco, Inc. *See* Madden v. Del Taco, Inc.
- De Marrais. *See* Huijers v. De Marrais
- Department of Real Estate. *See* Katz v. Department of Real Estate
- Department of Real Estate. *See* Madrid v. Department of Real Estate

Department of Real Estate. *See* The Grubb Co. Inc. v. Department of Real Estate

Dept. of Fish and Game. *See* Pacific Shores Property Owners Association v. Dept. of Fish and Game

Derish v. San Mateo–Burlingame Board (1982) 136 C.A.3d 534, 84

Dieterich International Truck Sales v. J.S. & J. Services, Inc. (1992) 3 C.A.4th 1601, 401

Dimmick. *See* Dimmick v. Dimmick

Dimmick v. Dimmick (1962) 58 C.2d 417, 290

Dina v. People ex rel Dept. of Transp. (2007) 151 C.A. 4th 1029, 312

Direnfield v. Stabile (1988) 198 C.A.3d 126, 106

Dolan-King. *See* Rancho Santa Fe Association v. Dolan-King

Dolan v. City of Tigard (1994) 114 S. Ct. 2309, 308

Donaldson v. California Department of Real Estate (2006) 134 C.A. 4th 948, 10

Donald Sterling Corp. *See* Housing Rights Center v. Donald Sterling Corp.

Donnell v. California Western School of Law (1988) 200 C.A.3d 715, 292

Dover Village Assn. v. Jennison (2010) 191 C.A. 4th 123, 280

Dromy v. Lukovsky (2013) 219 C.A.4th 278, 483

Dubin v. Robert Newhall Chesebrough Trust (2001) 96 C.A.4th 465, 403

Duin v. Security First National Bank (1955) 132 C.A.2d 904, 229

E

Easton v. Strassburger (1984) 152 C.A.3d 90, 42, 64

Ebel v. City of Corona (1985) 767 F.2d 635, 425

Echevarrieta v. City of Rancho Palos Verdes (2001) 86 C.A.4th 472, 444

Edmonds. *See* Armenta v. Edmonds

Edmonds. *See* Sheetz v. Edmonds

Edmonds. *See* Vinci v. Edmonds

Edmond's of Fresno v. McDonald Group, Ltd. (1985) 171 C.A.3d 598, 426

Ellis v. Chevron U.S.A., Inc. (1988) 201 C.A.3d 132, 156

Emeric v. Alvarado (1891) 90 C. 444, 321

Enea v. Superior Court (2005) 132 C.A. 4th 1559, 272

Enloe v. Kelso (2013) 217 C.A.4th 877, 338

Ennabe. *See* Pineda v. Ennabe

Enzler. *See* Anthony v. Enzler

Equitable Life Assurance Society. *See* BT-1 v. Equitable Life Assurance Society

Erickson. *See* Muzio v. Erickson

Erlich v. Menezes (1999) 21 C.4th 543, 161

Ernest Pestana Inc. *See* Kendall v. Ernest Pestana Inc.

Ersa Grae Corp. v. Fluor Corp. (1991) 1 C.A.4th 613, 150

Escrow Consultants, Inc. *See* Lee v. Escrow Consultants, Inc.

Espinoza v. Calva (2008) 169 C.A. 4th 1393, 485

Estate of Leslie (1984) 37 C.3d 186, 267

Estate of Lopez (1992) 8 C.A.4th 317, 318

Estate of Vargas (1974) 36 C.A.3d 714, 267

Estate of Worthy (1988) 205 C.A.3d 760, 322

ETCO Corporation v. Hauer (1984) 161 C.A.3d 1154, 151

E* Trade Mortgage Corporation. *See* Jones v. E* Trade Mortgage Corporation

Evans. *See* Rancho Santa Paula Mobile Home Park Ltd. v. Evans

Ewing v. City of Carmel-by-the-Sea (1991) 234 C.A.3d 1579, 443

Exxon Co., U.S.A. *See* Sachs v. Exxon Co., U.S.A.

F

Fair. *See* J.B.B. Investment Partners LTD. v. Fair

Fairchild v. Park (2001) 90 C.A.4th 919, 508

Fair Employment and Housing Council. *See* Auburn Woods I Homeowners Association v. Fair Employment and Housing Council

Fair Employment & Housing Commission. *See* Smith v. Fair Employment & Housing Commission

Fair Housing Council of Orange County Inc. v. Ayres (1994) 855 F. Supp. 315, 125

Falcon Television. *See* Salvaty v. Falcon Television

Falk. *See* Penner v. Falk

Fasano. *See* Sabo v. Fasano

Fashion Valley Mall LLC v. National Labor Relations Board (2007) 42 C.A. 4th 850, 22

Feduniak v. California Coastal Commission (2007) 148 C.A. 4th 1346, 437

Felgenhauer v. Soni (2004) 121 C.A.4th 17, 401

Fidelity Federal Savings & Loan v. de la Cuesta (1982) 458 U.S. 141, 331

Fidler v. Schiller (1963) 212 C.A.2d 569, 230

Field v. Century 21 Klowden-Forness Realty (1998) 63 C.A.4th 18, 42

Filante v. Kikendall (1955) 134 C.A.2d 695, 192

Finkelstein. *See* Ach v. Finkelstein

Fire Insurance Exchange v. Superior Court (2010) 181 C.A. 4th 388, 410

First Bank of San Luis Obispo. *See* Moore v. First Bank of San Luis Obispo

First Commercial Mortgage Co. v. Reece (2001) 89 C.A.4th 731, 339

First National Bank of Fresno. *See* Nystrom v. First National Bank of Fresno

First National Bank of La Habra v. Caldwell (1927) 84 C.A. 438, 456

Flores v. Transamerica Home First Inc. (2001) 93 C.A.4th 846, 159

Fluor Corp. *See* Ersa Grae Corp. v. Fluor Corp.

Foggy v. Ralph F. Clark & Assoc. Inc. (1987) 192 C.A.3d 1204, 50

Ford v. Cournale (1974) 36 C.A.3d 172, 77

Formosa Corp. v. Rogers (1952) 108 C.A.2d 397, 265

forsalebyowner.com Corporation v. Zinnemann (2005) 347 Fed. Supp. 2d 868, 135
 Foster v. Britton (2016) 242 C.A.4th 920, 509
 Foulks. *See* Seck v. Foulks
 Foundation for Ocean Research. *See* Owens v. Foundation for Ocean Research
 Fox. *See* Gray v. Fox
 Fox. *See* Brandt v. Fox
 Fox. *See* Froid v. Fox
 Fox. *See* Golde v. Fox
 Fox. *See* Pieri v. Fox
 Fox. *See* Powers v. Fox
 Francis T. v. Village Green Owners Ass'n. (1986) 42 C.3d 490, 443
 Franklin v. Hansen (1963) 59 C.2d 570, 172, 182
 Freeman. *See* Los Banos Gravel Company v. Freeman
 Friends of Davis v. City of Davis (2000) 83 C.A.4th 1004, 444
 Froid v. Fox (1982) 132 C.A.3d 832, 133
 Fry v. Bihl (1970) 6 C.A.3d 248, 362
 Fry v. George Elkins Company (1958) 162 C.A.2d 256, 219
 FSR Brokerage, Inc. *See* Brown v. FSR Brokerage, Inc.
 Fullerton Mtg. & Escrow Co. *See* Warrington Lumber Co. v. Fullerton Mtg. & Escrow Co.
 Furla v. Jon Douglas Co. (1998) 65 C.A.4th 1069, 40

G

Gage. *See* City of Los Angeles v. Gage
 Gagnard. *See* Realmuto v. Gagnard
 Garcia v. Holt (2015) 242 C.A.4th 600, 509
 Garcia v. Paramount Citrus Assn. (2008) 161 C.A.4th 321, 293
 Garcia v. World Savings (2010) 183 C.A. 4th 1031, 349
 Gardner v. Johnson (1952) 195 F.2d 717, 386
 Garland. *See* McKay and Company v. Garland
 Garrett v. Coast & Southern Federal Savings & Loan Ass'n. (1973) 9 C.3d 731, 362
 Gates Rubber Co. v. Ulman (1989) 214 C.A.3d 356, 249
 Geernaent v. Mitchell (1995) 31 C.A.4th 601, 73
 Gentile. *See* Wilson v. Gentile
 George Elkins Company. *See* Fry v. George Elkins Company
 Geothermal Kinetics Inc. v. Union Oil Co. (1977) 77 C.A.3d 56, 240
 Giannoni. *See* Lyon v. Giannoni
 Gibbs v. American Savings (1990) 217 C.A.3d 1372, 148
 Giebler v. M & B Associates a Limited Partnership (2003) 343 F.3d 1143, 120
 Gilbert v. Mercer (1960) 179 C.A.2d 29, 164
 Gilbert v. State (1990) 218 C.A.3d 234, 313
 Gilleo. *See* City of Ladue v. Gilleo
 Gilligan v. Jamco Development Corporation (1997) 108 Fed.3d 246, 125
 Godfrey v. Steinpress (1982) 128 C.A.3d 154, 83
 Golden Gate Hotel v. San Francisco City and County (1993) 836 F. Supp. 707, 443
 Golden Gateway Center v. Golden Gateway Tenants Association (1999) 73 C.A.4th 908, 22
 Golden Gateway Tenants Association. *See* Golden Gateway Center v. Golden Gateway Tenants Association
 Golde v. Fox (1979) 98 C.A.3d 167, 133
 Goldman. *See* Preston v. Goldman
 Gomez. *See* Davis v. Gomez
 Goodyear Rubber Corporation v. Munoz (1985) 170 C.A.3d 919, 151
 Gordon. *See* Brown v. Gordon
 Gordon. *See* Handy v. Gordon
 Goswick. *See* Welsch v. Goswick
 Gould. *See* Mitchell v. Gould
 Grace Family Church. *See* Vasilenko v. Grace Family Church
 Granberry v. Islay Investments (1993) 18 C.A.4th 885, 508
 Grant. *See* Jackson v. Grant
 Grant v. Marinell (1980) 112 C.A.3d 617, 229
 Gray v. Fox (1984) 151 C.A.3d 482, 84
 Greater Baltimore Board of REALTORS® v. Baltimore County (1990) 752 F. Supp. 193, 4
 Green. *See* Brown v. Green
 Green v. Brown (1951) 37 C.2d 391, 245, 290
 Green v. Superior Court (1974) 10 C.3d 616, 506
 Greenwich S.F. LLC v. Wong (2010) 190 C.A. 4th 739, 174
 Gregg Construction Co. *See* Contractors Dump Truck Service Inc. v. Gregg Construction Co.
 Gresch. *See* Wylie v. Gresch
 Griffin Dev. Co. v. City of Oxnard (1985) 39 C.3d 256, 423
 Grubb & Ellis Company v. Spengler (1983) 143 C.A.3d 890, 57
 Grupe v. California Coastal Common (1985) 166 C.A.3d 148, 436
 Guggenheim v. City of Goleta (2010) 638 F. 3d 1111, 502
 Guillory. *See* City of South San Francisco Housing Authority v. Guillory
 Gunter. *See* Leff v. Gunter
 Gutzie Assocs. v. Switer (1989) 215 C.A.3d 1636, 157

H

Hacienda Ranch Homes Inc. v. Superior Court (2011), 198 C.A. 4th 1122, 322
 Hagman v. Meyer Mount Corporation (2013) 215 C.A. 4th 82, 322
 Hall. *See* Skinner v. Hall
 Handley. *See* Wilson v. Handley
 Handy v. Gordon (1967) 65 C.2d 578, 362
 Handy v. Shiells (1987) 190 C.A.3d 512, 322
 Hansen. *See* Franklin v. Hansen
 Harmon. *See* Riddle v. Harmon
 Harper v. Ultimo (2004) 113 C.A.4th 1402, 173
 Harris. *See* Allred v. Harris
 Harris. *See* Stickel v. Harris
 Harrison v. Commonwealth Land Title Ins. Co. (1979) 97 C.A.3d 973, 459
 Harrison v. Heinzroth Mortgage Co. (1977) 430 F. Supp. 893, 121
 Harris v. Capital Growth Investors XIV (1991) 52 C.3d 1142, 133

Hartell. *See* Petersen v. Hartell
 Hauer. *See* ETCO Corporation v. Hauer
 Hawley. *See* King v. Hawley
 Hawn. *See* Spraltin v. Hawn
 Hayes. *See* Marchant v. Hayes
 Heinzroth Mortgage Co. *See* Harrison v. Heinzroth Mortgage Co.
 Hernandez v. City of Hanford (2007) 41 C. 4th 279, 421
 Higashi. *See* Yokohama Specie Bank Ltd. v. Higashi
 Hinson v. Delis (1972) 26 C.A.3d 62, 492
 Hirshfield v. Schwartz (2001) 91 C.A.4th 749, 394
 Hisey. *See* Wilson v. Hisey
 Hitzel. *See* Simons Brick Company v. Hitzel
 Hochstein v. Romero (1990) 219 C.A.3d 447, 252
 Hock Investment Co. *See* Marcus Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.
 Hofer v. Young (1995) 38 C.A.4th 52, 147
 Hoffman v. 162 North Wolfe, LLC (2014) 228 C.A.4th 1178, 86
 Hollister. *See* Sweat v. Hollister
 Holmes v. Summer (2010) 188 C.A.4th 1510, 86
 Holt. *See* Garcia v. Holt
 Home Loan Funding. *See* Smith v. Home Loan Funding
 Hope v. County of DuPage (1983) 717 F.2d 1061, 418
 Horiike v. Coldwell Banker Residential Brokerage Co (2016) 11 CA. 5th 1024, 44
 Horning v. Shilberg (2005) 13 C.A.4th 197, 63
 Housing Authority. *See* L & B Real Estate v. Housing Authority
 Housing Rights Center v. Donald Sterling Corp. (2003) 274 Fed. Supp. 2nd 1129, 135
 Hu. *See* Shapiro v. Hu
 Hubbard. *See* Baker v. Hubbard
 Hubbard v. Brown (1990) 50 C.3d 189, 292
 Hubert v. Williams (1982) 133 C.A.3d Supp.1, 129

Hughes v. Morrison (1984) 160 C.A.3d 103, 231
 Huijers v. De Marrais (1993) 11 C.A.4th 676, 32
 Hunter. *See* Rose v. Hunter
 Huntington Branch, NAACP. *See* Town of Huntington v. Huntington Branch, NAACP
 Huntington Continental Town House Association v. Miner (2014) 230 C.A.4th 590, 293
 Huntley Financial. *See* Kane v. Huntley Financial
 Huth v. Katz (1947) 30 C.2d 605, 321
 Hyatt v. Tedesco (2002) 96 C.A.4th Supp. 62, 485
 Hydrotech Systems v. Oasis Waterpark (1991) 52 C.3d 988, 375

I

Ilkhchooyi v. Best (1995) 37 C.A.4th 395, 508
 Imperial Irr. Dist. *See* Salton Bay Marina v. Imperial Irr. Dist.
 Imperial Irrigation District. *See* Boarts v. Imperial Irrigation District
 Ingwersen v. Barry (1897) 118 C. 342, 409
 Inland Investments Inc. *See* Webber v. Inland Investments Inc.
 In re Estate of De Harte (1961) 196 C.A.2d 452, 63
 In re Howell (1980) 638 F.2d 81, 382
 In re Marriage of Branco (1996) 47 C.A.4th 1621, 266
 In re Marriage of Campbell (1999) 74 C.A.4th 1058, 269
 In re Marriage of Cloney (2001) 91 C.A.4th 429, 455
 In re Marriage of Stitt (1983) 147 C.A.3d 579, 267
 In re Marriage of Tallman (1994) 22 C.A.4th 1697, 293
 In re Patterson's Estate, 34 C.A.2d 305, 9
 In re Rabin (2006) 336 B. R. 459, 382
 In re Wallace Reed Phelps (2001) 93 C.A.4th 451, 348
 Interland. *See* Salazar v. Interland
 Inter Mountain Mortgage, Inc. v. Salimen (2000) 78 C.A.4th 1434, 50
 Interstate Consol. Indus. *See* Wu v. Interstate Consol. Indus.

Irigoyen. *See* Burnand v. Irigoyen
 Irving. *See* Baldwin Park Redev. Agency v. Irving
 Islay Investments. *See* Granberry v. Islay Investments

J

Jackson v. Grant (1989) 876 F.2d 764, 357
 Jacobs v. Coldwell Banker Residential Brokerage Co (2017) 14 CA. 5th 438, 43
 Jacoby. *See* Washington Mutual Bank v. Jacoby
 Jamco Development Corporation. *See* Gilligan v. Jamco Development Corporation
 James Daniel Good. *See* U.S. v. James Daniel Good
 James E. Moline Builders, Inc. *See* Ability Center of Greater Toledo v. James E. Moline Builders, Inc.
 Jankey v. Twentieth Century Fox Film Corporation (2000) 212 F.3d 1159, 135
 Jaoudi Industrial & Trading Corporation. *See* L. Byron Culver & Assoc. v. Jaoudi Industrial & Trading Corporation
 Jaquez. *See* People v. Jaquez
 Jaramillo v. JH Real Estate Partners, Inc. (2003) 3 Cal. Rptr.3d 525, 159
 J.B.B. Investment Partners LTD. v. Fair (2014) 232 C.A. 4th 974, 174
 Jefferson Street Ventures, LLC v. City of Indio (2015) 236 C.A. 4th 175, 322
 Jennison. *See* Dover Village Assn. v. Jennison
 Jensen. *See* Lo v. Jensen
 Jensen v. Kenneth Mullen Co. (1989) 211 C.A.3d 653, 292
 JH Real Estate Partners, Inc. *See* Jaramillo v. JH Real Estate Partners, Inc.
 Johansen. *See* Lipton v. Johansen
 Johnson. *See* Johnson v. Johnson
 Johnson. *See* Gardner v. Johnson
 Johnson v. Johnson (1987) 192 C.A.3d 551, 322
 Jon Douglas Co. *See* Furla v. Jon Douglas Co.
 Jones. *See* Alamo School District v. Jones

Jones v. City of Los Angeles (1930) 211 C. 304, 424
 Jones v. E* Trade Mortgage Corporation (2005) 397 F.3d 810, 358
 Jones v. Mayer (1968) 392 U.S. 409, 118
 Jones v. Wachovia Bank (2014) 238 C.A.4th 935, 364
 Jones v. Wagner (2001) 90 C.A.4th 466, 293
 Jorgensen v. Beach 'N' Bay Realty Inc. (1981) 125 C.A.3d 155, 49
 J.S. & J. Services, Inc. *See* Dieterich International Truck Sales v. J.S. & J. Services, Inc.
 Jue v. Smiser (1994) 23 C.A.4th 312, 75

K

Kamp. *See* Lehman v. Kamp
 Kane v. Huntley Financial (1983) 146 C.A.3d 1092, 291
 Katz. *See* Huth v. Katz
 Katz v. Department of Real Estate (1979) 96 C.A.3d 895, 133
 Kelly. *See* Tyrone v. Kelly
 Kelo v. City of New London (Connecticut) (2005) 125 S. Ct. 2655, 6
 Kelso. *See* Enloe v. Kelso
 Kemptor. *See* Maldonado v. Kemptor
 Kendall v. Ernest Pestana Inc. (1985) 40 C.3d 488, 481
 Kenneth Mullen Co. *See* Jensen v. Kenneth Mullen Co.
 Kentwood Home Guardians. *See* Spitzer v. Kentwood Home Guardians
 Keys v. Romley (1966) 64 C.2d 396, 396
 Kikendall. *See* Filante v. Kikendall
 Kinder. *See* Pacific Plan of California v. Kinder
 King v. Hawley (1952) 113 C.A.2d 534, 245
 Kinney v. Vaccari (1980) 27 C.3d 348, 507
 Kish v. Bay Counties Title Guaranty Co. (1967) 254 C.A.2d 725, 465
 Klein v. United States of America (2010) 50 C. 4th 68, 291
 Klunker. *See* Locke v. Klunker
 Kohn. *See* National Land and Investment Co. v. Kohn

Korens v. Zukin Corp. (1989) 212 C.A.3d 1054, 479
 Kornbluth. *See* Cornelison v. Kornbluth
 Kraemer. *See* Shelley v. Kraemer
 Kraft. *See* Chen v. Kraft
 Krater v. City of Los Angeles (1982) 130 C.A.3d 839, 442
 Krieger v. Pacific Gas & Electric Co. (1981) 119 C.A.3d 137, 409
 Kuish v. Smith (2010) 181 C.A. 4th 1419, 162
 Kumar v. Yu (2011) 201 C.4th 1463, 495
 Kurtz v. Calvo (1999) 75 C.A.4th 191, 363
 Kwok v. Transnation Title Insurance Co. (2009) 170 C.A. 4th 1562, 459

L

La Jolla Village Homeowners' Assn. Inc. v. Superior Court 212 C.A.3d 1131, 439
 Lake County Title Co. *See* Wade v. Lake County Title Co.
 Lake Nacimiento Ranch v. San Luis Obispo County (1987) 830 F.2d 977, 419
 LaMarche. *See* Masin v. LaMarche
 Landes Constr. Co. v. Royal Bank (1987) 833 F.2d 1365, 173
 Larkin v. Cowert (1968) 263 C.A.2d 27, 240
 Lassen Savings and Loan Association. *See* Tucker v. Lassen Savings and Loan Association
 L & B Real Estate v. Housing Authority (2007) 149 C.A. 4th 950, 305
 L. Byron Culver & Assoc. v. Jaoudi Industrial & Trading Corporation (1991) 1 C.A.4d 300, 36
 Leakes v. Shamoun (1986) 187 C.A.3d 772, 291
 Lee. *See* Lee v. Lee
 Lee v. Escrow Consultants, Inc. (1989) 210 C.A.3d 915, 454
 Lee v. Lee (2009) 175 C.A. 4th 1553, 306
 Lee v. Title Insurance & Trust Co. (1968) 264 C.A.2d 160, 466
 Leff v. Gunter (1983) 33 C.3d 508, 272
 Lehman v. Kamp (1969) 273 C.A.2d 701, 321
 Lemmens. *See* Mercer v. Lemmens
 Lentini v. California Center for the Arts, Escondido (2004) 370 F.3d 837, 135
 Lepe. *See* CTC Real Estate Services v. Lepe
 Levy v. Wolff (1956) 46 C.2d 367, 152
 Lew v. Superior Court (1993) 20 C.A.4th 866, 395
 Lick Mill Creek Apartments v. Chicago Title Co. (1991) 231 C.A.3d 1654, 462
 Liebermensch. *See* Patel v. Liebermensch
 Liebler v. Point Loma Tennis Club (1995) 40 C.A.4th 1600, 429
 Lien. *See* Moller v. Lien
 Lindsay. *See* Becker v. Lindsay
 Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 419
 Lipton v. Johansen (1951) 105 C.A.2d 363, 229
 Little v. Community Bank (1992) 234 C.A.3d 355, 371
 Lobel. *See* Cadlerock Joint Ventures, LP v. Lobel
 Locke v. Klunker (1898) 123 C. 231, 363
 Lomanto. *See* Roberts v. Lomanto
 Lonberg v. Sanborn Theatres, Inc. (2001) 259 F.3d 1029, 127
 Longridge Estates. *See* AVNER v. Longridge Estates
 Long v. Coast Resorts Inc. (2002) 267 F.3d 918, 126
 Los Angeles Federal Savings and Loan et al. *See* Rubin v. Los Angeles Federal Savings and Loan et al.
 Los Banos Gravel Company v. Freeman (1976) 58 C.A.3d 785, 378
 Loviet v. Seyfarth (1972) 22 C.A.3d 841, 386
 Lo v. Jensen (2001) 88 C.A.4th 1093, 343
 Lowe v. Ruhlman (1945) 67 C.A.2d 828, 254
 Lozo. *See* Pacific Shore Funding v. Lozo
 Lucas v. Pollock (1992) 7 C.A.4th 668, 293

Lucas v. South Carolina Coastal Council (1992) 112 S. Ct. 2886, 419
 Lucatero. *See* People v. Lucatero
 Lukovsky. *See* Dromy v. Lukovsky
 Lundy v. California Realty (1985) 170 C.A.3d 813, 486
 Lyon v. Giannoni (1959) 168 C.A.2d 336, 231

M

- Mabry v. Superior Court (2010) 165 C.A. 4th 208, 342
 MacDonald Properties Inc. v. Bel Air Country Club (1977) 72 C.A.3d 693, 408
 MacFadden v. Walker (1971) 5 C.3d 809, 347
 Madden v. Del Taco, Inc. (2007) 150 C.A.4th 294, 126
 Madhani v. Cooper (2003) 106 C.A.4th 412, 488
 Madison. *See* Marbury v. Madison
 Madrid v. Department of Real Estate (1984) 152 C.A.3d 454, 104
 Mains v. City Title Insurance Company (1949) 34 C.2d 580, 451
 Maldonado v. Kempton (2006) 422 Fed Supp 2nd 1169, 5
 Malson. *See* Roth v. Malson
 Manderville v. PCG&S Group, Inc. (2007) 146 C.A. 4th 1486, 78
 Mangini v. Aerojet General Corp. (1991) 230 C.A.3d 1125, 408
 Marbury v. Madison (1803) 1 Cranch 137, 13
 Marchant v. Hayes (1897) 117 C. 669, 386
 Marcus Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co. (1998) 68 C.A.4th 83, 174
 Marina Point, Ltd. v. Wolfson (1982) 30 C.3d 721, 129
 Marin County Board v. Polsson (1976) 16 C.3d 920, 79
 Marinell. *See* Grant v. Marinell
 Marks v. Walter G. McCarty Corp. (1949) 33 C.2d 814, 173
 Marler. *See* Walters v. Marler
 Marriage of Broderick (1989) 209 C.A.3d 489, 292
 Marriage of Rico (1992) 10 C.A.4th 706, 266
 Marriott Hotels, Inc. *See* Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.
 Marsteler. *See* Bate v. Marsteler
 Martin. *See* Andrade Development Co. v. Martin
 Martin. *See* Salinas v. Martin
 Martins Beach LLC. *See* Surfrider Foundation v. Martins Beach LLC
 Martin v. Bridgeport Community Association (2009) 173 C.A. 4th 1024, 426
 Marvin. *See* Marvin v. Marvin
 Marvin v. Marvin (1978) C. 3d 660, 268
 Maryland Bank & Trust. *See* United States of America v. Maryland Bank & Trust
 Masin v. LaMarche (1982) 136 C.A.3d 687, 403
 Mastagni. *See* Myrick v. Mastagni
 Masters Props. No. 6. *See* Ballou v. Masters Props. No. 6
 Matreyek. *See* California Federal Bank v. Matreyek
 Mayer. *See* Jones v. Mayer
 M & B Associates a Limited Partnership. *See* Giebler v. M & B Associates a Limited Partnership
 McCarthy v. Security Trust & Savings Bank (1922) 188 C. 229, 321
 McClain v. Octagon Plaza LLC (2008) 159 C.A.4th 784, 509
 McDaniel v. Sunset Manor Co. (1990) 220 C.A.3d 1, 488
 McDermott. *See* Connolly v. McDermott
 McDonald Group, Ltd. *See* Edmond's of Fresno v. McDonald Group, Ltd.
 McKay and Company v. Garland (1986) 701 S.W.2d 392, 231
 McKenna. *See* City of Oceanside v. McKenna
 McKnight. *See* Alexander v. McKnight
 McPhetridge v. Smith (1929) 101 C.A.122, 35
 Melton v. Boustred (2010) 183 C.A. 4th 521, 284
 Menezes. *See* Erlich v. Menezes
 Mercer. *See* Gilbert v. Mercer
 Mercer v. Lemmens (1964) 230 C.A.2d 167, 172
 Merrill. *See* Warren v. Merrill
 Merrill v. Buck (1962) 58 C.2d 552, 84
 Merzorian v. Papazian (1921) 53 C.A. 112, 230
 Metz. *See* Crogan v. Metz
 Meyer Mount Corporation. *See* Hagman v. Meyer Mount Corporation
 Michel v. Moore & Associates (2007) 156 C.A. 4th 756, 71
 Miller. *See* United States v. Miller
 Miller v. Weitzen (2005) 133 C.A. 4th 732, 286
 Mills. *See* Roberts v. Mills
 Miner. *See* Huntington Continental Town House Association v. Miner
 Ministor Ventures. *See* Cregg v. Ministor Ventures
 Mitchell. *See* Geernaent v. Mitchell
 Mitchell v. Gould (1928) 90 C.A. 647, 37
 Mix. *See* Behniwal v. Mix
 Mobile Aire Estates. *See* Andrews v. Mobile Aire Estates
 Moller v. Lien (1994) 25 C.A.4th 822, 363
 Montgomery v. Bank of America (1948) 85 C.A.2d 559, 321
 Moore & Associates. *See* Michel v. Moore & Associates
 Moore v. First Bank of San Luis Obispo (1998) 68 C.A.4th 768, 22
 Moore v. Turner (1952) 137 W.V. 299, 71 S.E.2d 342, 48
 Mora. *See* Coleman v. Mora
 Moriarty. *See* Segalas v. Moriarty
 Morrison. *See* Hughes v. Morrison
 Muller. *See* People ex rel. Dept. of Transportation v. Muller
 Multani v. Witkin & Neal (2013), 215 C.A. 4th 1428, 280
 Municipal Court. *See* Vargas v. Municipal Court
 Munoz. *See* Goodyear Rubber Corporation v. Munoz
 Munoz. *See* Ryland Mews Homeowners Assn. v. Munoz
 Murphy. *See* Brewer v. Murphy

Muzio v. Erickson (1919) 41 C.A. 413, 408
 MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works, Inc. (2005) 36 C.A. 4th 412, 374
 Myrick v. Mastagni (2010) 185 C.A. 4th 1082, 491

N

Nash v. Superior Court (1978) 86 C.A.3d 690, 148
 Nastos. *See* Crawford v. Nastos
 National Association of REALTORS.
 See People v. National Association of REALTORS
 National Labor Relations Board.
 See Fashion Valley Mall LLC v. National Labor Relations Board
 National Land and Investment Co. v. Kohn (1965) 215 A.2d 597, 418
 Nelson. *See* Shupe v. Nelson
 Nelson. *See* Broadmoor San Clemente Homeowners Ass'n. v. Nelson
 Nesbitt Fruit Products Inc. v. Del Monte Beverage Co. (1966) 177 C.A.2d 353, 254
 Nevada Livestock Prod. Credit Ass'n.
 See Balistreri v. Nevada Livestock Prod. Credit Ass'n
 New v. Consolidated Rock Prods. (1984) 171 C.A.3d 681, 287
 Niederhauser Ornamental and Metal Works, Inc. *See* MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works, Inc.
 Nippon Credit Bank v. 1333 N. California Blvd. (2001) 86 C.A.4th 486, 363
 NL Industries, Inc. *See* Wiegmann & Rose International Corp. v. NL Industries, Inc.
 Nobel Court Development LLC.
 See Villa Vicenza Homeowners Association v. Nobel Court Development LLC
 No GWEN Alliance v. Aldridge (1988) 855 F.2d 1380, 435
 Nollan v. California Coastal Commission (1987) 107 S. Ct. 3141, 436
 Noronha v. Stewart (1988) 199 C.A.3d 485, 409

Norris v. Williams (1947) 54 A.2d 331, 441
 Northland Bldg. Corp. *See* Southwest Title Ins. Co. v. Northland Bldg. Corp.
 Northwestern Title Co. *See* Zang v. Northwestern Title Co.
 Nussbaum v. Weeks (1989) 214 C.A.3d 1589, 81
 Nutt. *See* Nutt v. Nutt
 Nutt v. Nutt (1966) 247 C.A.2d 166, 386
 Nystrom v. First National Bank of Fresno (1978) 81 C.A.3d 759, 184

O

Oasis Waterpark. *See* Hydrotech Systems v. Oasis Waterpark
 Oates. *See* Bardis v. Oates
 Ocean Harbor House Homeowners Association v. California Coastal Commission (2008) 163 C.A. 4th 215, 437
 Octagon Plaza LLC. *See* McClain v. Octagon Plaza LLC
 Oelke. *See* Collier v. Oelke
 O'Hara v. Western Seven Trees Corp. (1977) 75 C.A.3d 798, 506
 Ojai. *See* Carty v. Ojai
 Olar v. Schroit (1984) 155 C.A.3d 861, 506
 Olsher. *See* Castaneda v. Olsher
 O'Meara v. De La Mater (1942) 52 C.A.2d 665, 362
 O'Mectin. *See* Swanberg v. O'Mectin
 Ong. *See* Pintor v. Ong
 Orlando v. Berns (1957) 154 C.A.2d 753, 363
 Ornelas v. Randolph (1993) 4 C.4th 1095, 285
 Osborne. *See* Osborne v. Osborne
 Osborne v. Osborne (1954) 42 C.2d 358, 246
 Otay Water District v. Beckwith (1991) 1 C.A.4th 1041, 402
 Owens v. Foundation for Ocean Research (1980) 107 C.A.3d 179, 229

P

Pacific Bell. *See* Spar v. Pacific Bell
 Pacific Gas & Electric Co. *See* Krieger v. Pacific Gas & Electric Co.

Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc. (1993) 19 C.A.4th 615, 47
 Pacific Plan of California v. Kinder (1978) 84 C.A.3d 215, 133
 Pacific Shore Funding v. Lozo (2006) 138 C.A. 4th 1342, 358
 Pacific Shores Property Owners Association v. Dept. of Fish and Game (2016) 244 C.A. 4th 12, 410
 Padilla v. Rodas (2008) 160 C.A.4th 742, 293
 PAL Investments Inc. *See* Ball v. Steadfast—BLK.; *See* Wells Fargo Bank v. PAL Investments Inc.
 Palmer v. Zaklama (2003) 109 C.A.4th 1367, 381
 Pan Pacific Properties Inc. v. Santa Cruz (1978) 81 C.A.3d 244, 441
 Papazian. *See* Merzoian v. Papazian
 Paradise Hills Associates v. Procel (1991) 235 C.A.3d 1528, 21
 Paramount Citrus Assn. *See* Garcia v. Paramount Citrus Assn.
 Pardee Construction Co. v. City of Camarillo (1984) 37 C.3d 465, 443
 Park. *See* Stewart Title Guaranty Co. v. Park
 Park. *See* Fairchild v. Park
 Parkmerced Co. *See* People v. Parkmerced Co.
 Patel. *See* Booska v. Patel
 Patel v. Liebermensch (2008) 45 C. 4th 344, 195
 Paul M. Zagaris Inc. *See* City of Turlock v. Paul M. Zagaris Inc.
 Paul v. Schoellkopf (2005) 128 C.A.4th 147, 218
 Pau v. Yosemite Park (1991) 928 F.2d 880, 292
 Pay 'N' Pak Stores v. Superior Court (1989) 210 C.A.3d 1404, 481
 PCG&S Group, Inc. *See* Manderville v. PCG&S Group, Inc.
 Penner v. Falk (1984) 153 C.A.3d 858, 486
 People ex rel Dept. of Transp. *See* Dina v. People ex rel Dept. of Transp.
 People ex rel. Dept. of Transportation v. Muller (1984) 36 C.3d 263, 321

- People v. Asuncion (1984) 152 C.A.3d 422, 333
 People v. Byers (1979) 90 C.A.3d 140, 432
 People v. Jaquez (1984) 163 C.A.3d 918, 50
 People v. Lucatero (2008) 166 C.A. 4th 1110, 22
 People v. National Association of REALTORS (1981) 120 C.A.3d 459, 83
 People v. Parkmerced Co. (1988) 198 C.A.3d 683, 479
 People v. Roman (1991) 227 C.A.3d 674, 506
 People v. Sanders (1998) 67 C.A.4th 1403, 300
 People v. Sipper (1943) 61 C.A.2d 844, 84
 Pepper Tree Office Center Assocs.
 See Coldwell Banker and Co. v. Pepper Tree Office Center Assocs.
 Petersen v. Hartell (1985) 40 C.3d 102, 347
 Peterson. *See* U.S. v. Peterson
 Peterson Enterprises, LLC. *See* Annocki v. Peterson Enterprises, LLC
 Peterson v. Superior Court (1995) 10 C.4th 1185, 486
 Pfaff v. U.S. Dept. of Housing and Urban Development (1996) 88 F.3d 739, 122
 Phelps v. American Mortgage Company (1936) 6 C.2d 604, 254
 Phillippe v. Shapell Indus. Inc. (1987) 43 C.3d 1247, 168
 Pieri v. Fox (1979) 96 C.A.3d 802, 134
 Pike v. Tuttle (1971) 18 C.A.3d 746, 362
 Pineda v. Ennabe (1998) 61 C.A.4th 1403, 293
 Pintor v. Ong (1989) 211 C.A.3d 837, 341
 Point Loma Tennis Club. *See* Liebler v. Point Loma Tennis Club
 Pollock. *See* Lucas v. Pollock
 Polsson. *See* Marin County Board v. Polsson
 Pooley. *See* BD Inns v. Pooley
 Powers v. Fox (1979) 96 C.A.3d 440, 133
 Preston v. Goldman (1986) 42 C.3d 108, 285
 Price. *See* Sui v. Price
 Privette v. Superior Court (1993) 5 C.4th 689, 284
 Procel. *See* Paradise Hills Associates v. Procel
 Pruneyard Shopping Center. *See* Robins v. Pruneyard Shopping Center
 Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74, 4
 Puccinelli. *See* William v. Puccinelli
- Q**
- Quinones. *See* Tremper v. Quinones
- R**
- Ralph F. Clark & Assoc. Inc. *See* Foggy v. Ralph F. Clark & Assoc. Inc.
 Ramponi. *See* Cooke v. Ramponi
 Rancho Santa Barbara. *See* Taylor v. Rancho Santa Barbara
 Rancho Santa Fe Association v. Dolan-King (2004) 115 C.A.4th 28, 444
 Rancho Santa Paula Mobile Home Park Ltd. v. Evans (1994) 26 C.A.4th 1139, 508
 Randolph. *See* Ornelas v. Randolph
 Randone v. Appellate Dept. (1971) 5 C.3d 536, 372
 Raskov. *See* Barry v. Raskov
 Rattray v. Scudder (1946) 28 C.2d 214, 198
 Realmuto v. Gagnard (2003) 110 C.A.4th 193, 71
 Realty Projects Inc. v. Smith (1973) 32 C.A.3d 204, 103
 Reece. *See* First Commercial Mortgage Co. v. Reece
 Reese v. Wong (2001) 93 C.A.4th 51, 161
 Regency Outdoor Advertising, Inc. v. City of Los Angeles (2006) 39 C.A. 4th 507, 312
 Rent Control Board. *See* Santa Monica Pines Ltd. v. Rent Control Board
 Reynolds. *See* Anderson v. Reynolds
 Riando v. San Benito Title Guarantee Co. (1950) 35 C.2d 170, 466
 Riddle v. Harmon (1980) 102 C.A.3d 524, 264
 Riley v. Chambers (1919) 181 C. 589, 10
 Ring Bros. Management Corp. *See* Smith v. Ring Bros. Management Corp.
 R.J. Kuhl Corp. v. Sullivan (1993) 13 C.A.4th 1589, 183
 Robbins v. Davi (2009) 175 C.A. 4th 118, 135
 Robert Newhall Chesebrough Trust.
 See Dubin v. Robert Newhall Chesebrough Trust
 Roberts. *See* Winet v. Roberts
 Roberts v. Lomanto (2003) 112 C.A.4th 1553, 39
 Roberts v. Mills (1922) 56 C.A. 556, 242
 Robinett v. Brown (1914) 167 C. 735, 385
 Robins. *See* Pruneyard Shopping Center v. Robins
 Robins v. Pruneyard Shopping Center (1979) 23 C.3d 899, 4
 Rodas. *See* Padilla v. Rodas
 Rodom. *See* Burgess v. Rodom
 Rodriguez v. Calif. Dept. of Real Estate (1997) 51 C.A.4th 1289, 134
 Rogers. *See* Formosa Corp. v. Rogers
 Roman. *See* People v. Roman
 Romero. *See* Hochstein v. Romero
 Romike Properties. *See* Schoenberg v. Romike Properties
 Romley. *See* Keys v. Romley
 Rosenbaum v. Security Pacific Corp. (1996) 43 C.A.4th 1084, 507
 Rose v. Hunter (1957) 155 C.A.2d 319, 229
 Ross v. City of Yorba Linda (1991) 1 C.A.4th 954, 422
 Rothchild. *See* Barberi v. Rothchild
 Roth v. Malson (1998) 67 C.A.4th 552, 149
 Royal Bank. *See* Landes Constr. Co. v. Royal Bank
 Rubin v. Los Angeles Federal Savings and Loan et al. (1984) 159 C.A.3d 292, 331
 Rue-Ell Enterprises Inc. v. City of Berkeley (1983) 147 C.A.3d 81, 507
 Ruhlman. *See* Lowe v. Ruhlman
 Ryland Mews Homeowners Assn. v. Munoz (2015) 234 C.A.4th 705, 294

S

- Sabo v. Fasano (1984) 154 C.A.3d 502, 220
- Sachs v. Exxon Co., U.S.A. (1992) 9 C.A.4th 1491, 493
- Safeco Title Ins. Co. *See* Contemporary Invs., Inc. v. Safeco Title Ins. Co.
- Sainez. *See* City and County of San Francisco v. Sainez
- Salahutin v. Valley of Calif. Inc. (1994) 24 C.A.4th 555, 75
- Salazar v. Interland (2007) 152 C.A. 4th 1031, 115
- Salchi v. Surfside 111 (2011), 200 C.A. 4th 1146, 281
- Salimen. *See* Inter Mountain Mortgage, Inc. v. Salimen
- Salinas v. Martin (2008) 166 C.A. 4th 1098b, 283
- Salton Bay Marina v. Imperial Irr. Dist. (1985) 172 C.A.3d 914, 163
- Salvaty v. Falcon Television (1985) 165 C.A.3d 798, 399
- Samson v. Transamerica Ins. Co. (1981) 30 C.3d 220, 466
- San Benito Title Guarantee Co.
See Riando v. San Benito Title Guarantee Co.
- Sanborn Theatres, Inc. *See* Lonberg v. Sanborn Theatres, Inc.
- Sanders. *See* People v. Sanders
- Sanders Construction Co. v. Cerda (2009) 175 C.A. 4th 430, 376
- San Diego Gas and Electric Co. v. Superior Court (1996) 13 C.4th 893, 409
- San Francisco City and County.
See Golden Gate Hotel v. San Francisco City and County
- San Francisco Residential Rent Stabilization and Arbitration Board.
See Baychester Shopping Center, Inc. v. San Francisco Residential Rent Stabilization and Arbitration Board
- San Luis Obispo County. *See* Lake Nacimiento Ranch v. San Luis Obispo County
- San Mateo–Burlingame Board. *See* Derish v. San Mateo–Burlingame Board
- Sanowicz v. Bacal (2015) 234 C.A.4th 1027, 58
- Santa Cruz. *See* Pan Pacific Properties Inc. v. Santa Cruz
- Santa Monica Pines Ltd. v. Rent Control Board (1984) 35 C.3d 858, 507
- Santa Monica Rent Control Board.
See Bisno v. Santa Monica Rent Control Board
- Santa Monica Rent Control Board.
See Sterling v. Santa Monica Rent Control Board
- Savage v. Trammell Crow Co., Inc. (1990) 223 C.A.3d 1562, 21
- Save the Welwood Murray Memorial Library Comm. v. City Council (1989) 215 C.A.3d 1003, 322
- Sawyer. *See* Yeoman v. Sawyer
- Scarborough v. Woodill (1907) 7 C.A. 39, 408
- Schaffter v. Creative Capital Leasing Group LLC (2008) 166 C.A. 4th 745, 193
- Scheerer v. Cuddy (1890) 85 C. 270, 507
- Scher v. Burke (2017) 3 C.A. 4th 760, 308
- Schiller. *See* Fidler v. Schiller
- Schmidt. *See* Banville v. Schmidt
- Schoellkopf. *See* Paul v. Schoellkopf
- Schoenberg v. Romike Properties (1967) 251 C.A.2d 154, 59
- Schroit. *See* Olar v. Schroit
- Schulman v. Vera (1980) 108 C.A.3d 552, 492
- Schwartz. *See* Hirshfield v. Schwartz
- Scudder. *See* Rattray v. Scudder
- Seatrail Terminal of California, Inc. v. County of Alameda (1978) 83 C.A.3d 69, 240
- Seck v. Foulks (1972) 25 C.A.3d 556, 166
- Security First National Bank. *See* Duin v. Security First National Bank
- Security Pacific Corp. *See* Rosenbaum v. Security Pacific Corp.
- Security Title Ins. Co. *See* Cunningham v. Security Title Ins. Co.
- Security Trust & Savings Bank.
See McCarthy v. Security Trust & Savings Bank
- Segalas v. Moriarty (1989) 211 C.A.3d 1583, 498
- Sei Fujii v. State of California (1952) 38 Cal.2d 718, 260
- Selby Realty v. City of San Buenaventura (1973) 10 C.3d 110, 442
- Selger v. Steven Bros. Inc. (1990) 222 C.A.3d 1585, 292
- Seyfarth. *See* Loviet v. Seyfarth
- Shaefer. *See* Camacho v. Shaefer
- Shamoun. *See* Leakes v. Shamoun
- Shapell Indus. Inc. *See* Phillippe v. Shapell Indus. Inc.
- Shapiro v. Hu (1986) 188 C.A.3d 324, 221
- Shapiro v. Sutherland (1998) 60 C.A.4th 666, 83
- Sheetz v. Edmonds (1988) 201 C.A.3d 1432, 98
- Shelley v. Kraemer (1948) 334 U.S. 1, 68 S.C. 836, 427
- Shiells. *See* Handy v. Shiells
- Shilberg. *See* Horning v. Shilberg
- Shipman v. Boething Treeland Farms Inc. (2000) 77 C.A.4th 1424, 286
- Shupe v. Nelson (1967) 254 C.A.2d 693, 172
- Sierra Pacific Industries v. Carter (1980) 104 C.A.3d 579, 48, 84
- Signore. *See* Brunelle v. Signore
- Simons Brick Company v. Hitzel (1925) 72 C.A. 1, 380
- Sipper. *See* People v. Sipper
- Skinner v. Hall (1886) 69 C. 195, 384
- Small Property Owners of San Francisco v. City and County of San Francisco (2006) 141 C.A.4th 1388, 508
- Smiser. *See* Jue v. Smiser
- Smith. *See* McPhetridge v. Smith
- Smith. *See* Realty Projects Inc. v. Smith
- Smith. *See* Kuish v. Smith
- Smith v. Allen (1968) 68 C.2d 93, 347
- Smith v. Coldwell Banker Real Estate Services (2000) 122 F. Supp. 2d 267, 85
- Smith v. Fair Employment & Housing Commission (1996) 12 C. 4th 1143, 130
- Smith v. Home Loan Funding (2011) 192 C.A. 4th 1331, 29
- Smith v. Ring Bros. Management Corp. (1986) 183 C.A.3d 649, 134
- Smith v. Zak (1971) 20 C.A.3d 785, 49
- Snider. *See* Clements v. Snider
- Sobke. *See* City of San Diego v. Sobke
- Soifer v. Chicago Title (2010) 187 C.A. 4th 365, 460

- Soni. *See* Felgenhauer v. Soni
- South Bay Engineering Corp. v. Citizens Sav. & Loan Assn. (1975) 51 C.A.3d 453, 386
- South Carolina Coastal Council.
See Lucas v. South Carolina Coastal Council
- South Coast Regional Commission.
See AVCO Community Developers Inc. v. South Coast Regional Commission
- Southern Burlington County NAACP v. Township of Mount Laurel (1975) 336 A.2d 713, 418
- Southland Corp. v. Superior Court (1988) 203 C.A.3d 656, 292
- Southland Title Corporation v. Superior Court (1991) 231 C.A.3d 530, 460
- Southwest Title Ins. Co. v. Northland Bldg. Corp. (1976) 542 S.W.2d 436, 458
- Spar v. Pacific Bell (1991) 235 C.A.3d 1480, 409
- Specialty Restaurants Corp. v. County of Los Angeles (1977) 67 C.A.3d 924, 254
- Speck. *See* Thomas v. Speck
- Spengler. *See* Grubb & Ellis Company v. Spengler
- Spitzer v. Kentwood Home Guardians (1972) 24 C.A.3d 215, 291
- Spraltin v. Hawn (1967) 156 S.E.2d 402, 48
- Sprecher v. Adamson Cos. (1981) 30 C.3d 358, 408
- Springmeyer v. City of South Lake Tahoe (1982) 132 C.A.3d 375, 244
- Stabile. *See* Direnfield v. Stabile
- State. *See* Gilbert v. State
- State Farm Fire and Cas. Co. *See* Altus Bank v. State Farm Fire and Cas. Co.
- State of California. *See* Sei Fujii v. State of California
- Steadfast—BLK. *See* Ball v. Steadfast—BLK.
- Steele. *See* Wilson v. Steele
- Steinpress. *See* Godfrey v. Steinpress
- Sterling v. Santa Monica Rent Control Board (1984) 162 C.A.3d 1021, 502
- Sterling v. Taylor (2007) 40 C.A. 4th 757, 150
- Steven Bros. Inc. *See* Selger v. Steven Bros. Inc.
- Stewart. *See* Noronha v. Stewart
- Stewart Title Guaranty Co. v. Park (2001) 250 F.3d 1249, 134
- Stickel v. Harris (1987) 196 C.A.3d 575, 333
- Stone v. Daily (1919) 181 C. 571, 301
- Storage Services v. C.R. Oosterbaan et al. (1989) 214 C.A.3d 498, 162
- Strassburger. *See* Easton v. Strassburger
- Strebel v. Brenlar (2006) 135 C.A. 4th 740, 40
- Stuart-Wright Mortgage, Inc. *See* 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.
- Sui v. Price (2011) 196 C.A. 4th 933, 280
- Sullivan. *See* R.J. Kuhl Corp. v. Sullivan
- Sumerset Garden Townhouse HOA.
See Cadam v. Sumerset Garden Townhouse HOA
- Summer. *See* Holmes v. Summer
- Sunset Manor Co. *See* McDaniel v. Sunset Manor Co.
- Superior Court. *See* Coldwell Banker Residential Brokerage Co. Inc. v. Superior Court
- Superior Court. *See* Nash v. Superior Court
- Superior Court. *See* Cunningham v. Superior Court
- Superior Court. *See* Enea v. Superior Court
- Superior Court. *See* Privette v. Superior Court
- Superior Court. *See* Southland Corp. v. Superior Court
- Superior Court. *See* Hacienda Ranch Homes Inc. v. Superior Court
- Superior Court. *See* Mabry v. Superior Court
- Superior Court. *See* Fire Insurance Exchange v. Superior Court
- Superior Court. *See* Lew v. Superior Court
- Superior Court. *See* San Diego Gas and Electric Co. v. Superior Court
- Superior Court. *See* La Jolla Village Homeowners' Assn. Inc. v. Superior Court
- Superior Court. *See* Southland Title Corporation v. Superior Court
- Superior Court. *See* Barela v. Superior Court
- Superior Court. *See* Green v. Superior Court
- Superior Court. *See* Pay 'N' Pak Stores v. Superior Court
- Superior Court. *See* Peterson v. Superior Court
- Superior Lumber Co. v. Sutro (1979) 92 C.A.3d 954, 385
- Superscope, Inc. *See* Tenzer v. Superscope, Inc.
- Surfrider Foundation v. Martins Beach LLC (2017) 14 C.A.5th 238, 408
- Surfside 111. *See* Salchi v. Surfside 111
- Sutherland. *See* Shapiro v. Sutherland
- Sutro. *See* Superior Lumber Co. v. Sutro
- Swanberg v. O'Mectin (1984) 157 C.A.3d 325, 507
- Sweat v. Hollister (1995) 37 C.A.4th 603, 85
- Sweet. *See* Brown v. Sweet
- Switer. *See* Gutzie Assocs. v. Switer
- Sylvia Landfield Trust. v. City of Los Angeles (2013) 729 F. 3rd 1189, 509

T

- Taggart. *See* Ward v. Taggart
- Tan v. Annel Management Co. (2008) 162 C.A. 4th 621, 487
- Target Corp. *See* Van v. Target Corp.
- Taylor. *See* Sterling v. Taylor
- Taylor v. Rancho Santa Barbara (2000) 206 F.3d 932, 119
- Tedesco. *See* Hyatt v. Tedesco
- Tenzer v. Superscope, Inc. (1985) 39 C.3d 18, 81
- Terra Nostra Consultants. *See* C.B. Ellis, Inc. v. Terra Nostra Consultants
- The Grubb Co. Inc. v. Department of Real Estate (2011) 194 C.A. 4th 1494, 135
- Thomas v. Speck (1941) 47 C.A.2d 512, 254
- Title Insurance & Trust Co. *See* Lee v. Title Insurance & Trust Co.
- Tortosa. *See* Carleton v. Tortosa

Town of Huntington v. Huntington Branch, NAACP (1989) 488 U.S. 15, 134

Town of South Kingston, R.I. *See* Annicelli v. Town of South Kingston, R.I.

Township of Mount Laurel. *See* Southern Burlington County NAACP v. Township of Mount Laurel

Trammell Crow Co., Inc. *See* Savage v. Trammell Crow Co., Inc.

Transamerica Home First Inc. *See* Flores v. Transamerica Home First Inc.

Transamerica Ins. Co. *See* Samson v. Transamerica Ins. Co.

Transamerica Title Ins. Co. *See* Axley v. Transamerica Title Ins. Co.

Transamerica Title Ins. Co. *See* Warrington v. Transamerica Title Ins. Co.

Transnation Title Insurance Co. *See* Kwok v. Transnation Title Insurance Co.

Tremper v. Quinones (2004) 115 C.A.4th 944, 409

Tsang. *See* Chan v. Tsang

Tucker. *See* Zlotoff v. Tucker

Tucker v. Lassen Savings and Loan Association (1974) 12 C.3d 629, 346

Turner. *See* Moore v. Turner

Tuttle. *See* Pike v. Tuttle

Twentieth Century Fox Film Corporation. *See* Jankey v. Twentieth Century Fox Film Corporation

Twentynine Palms Enterprises Corporation v. Bardos (2012) 210 C.A. 4th 1435, 376

Tyrone v. Kelly (1973) 9 C.A.3d 1, 230

U

Ulman. *See* Gates Rubber Co. v. Ulman

Ultimo. *See* Harper v. Ultimo

Union Mortgage Company. *See* Wyatt v. Union Mortgage Company

Union Oil Co. *See* Geothermal Kinetics Inc. v. Union Oil Co.

United Advertising Corp. v. Borough of Metuchen (1964) 198 A.2d 447, 441

United Multiple Listing Service v. Bernstein (1982) 134 C.A.3d 486, 84

United Refrigeration Corp. *See* Bisetti v. United Refrigeration Corp.

United States of America. *See* Klein v. United States of America

United States of America v. Maryland Bank & Trust (1986) 632 F. Supp. 573, 288

United States v. Miller (1982) 676 F.2d 359, 362

Ursino v. Big Boy Restaurants of America (1987) 192 C.A.3d 394, 285

U.S. Dept. of Housing and Urban Development. *See* Pfaff v. U.S. Dept. of Housing and Urban Development

U.S. v. 564 acres of land (1979) 99 S. Ct. 1854, 321

U.S. v. 967.905 acres of land (1969) 305 F. Supp. 83, 321

U.S. v. 3814 N.W. Thurman St. (1999) 164 F.3d 1191, 314

U.S. v. California Mobile Home Park Management Co. (1994) 29 F.3d 1413, 134

U.S. v. Causby, (1946) 328 U.S. 256, 239

U.S. v. Cloud (1989) 872 F.2d 846, 155

U.S. v. James Daniel Good (1993) 114 S. Ct. 492, 314

U.S. v. Peterson (2008) 538 F.3d 1064, 77

V

Vaccari. *See* Kinney v. Vaccari

Valley of Calif. Inc. *See* Salahutin v. Valley of Calif. Inc.

VanKlompberg v. Berghold (2005) 126 C.A. 4th 345, 398

Van v. Target Corp. (2007) 155 C.A. 4th 1375, 6

Vargas v. Municipal Court (1978) 22 C.3d 902, 497

Vasilenko. v. Grace Family Church (2017) 3 CA 5th 1077, 294

Vega v. City of West Hollywood (1990) 223 C.A.3d 1343, 506

Vera. *See* Schulman v. Vera

Village Green Owners Ass'n. *See* Francis T. v. Village Green Owners Ass'n.

Villa Vicenza Homeowners Association v. Nobel Court Development LLC (2010) 191 C.A. 4th 963, 22

Vinci v. Edmonds (1986) 185 C.A.3d 1251, 134

W

Wachovia Bank. *See* Jones v. Wachovia Bank

Wade v. Lake County Title Co. (1970) 6 C.A.3d 824, 467

Wagner. *See* Jones v. Wagner

Walker. *See* MacFadden v. Walker

Walker v. Crigler (1992) 976 F.2d 900, 44

Walter G. McCarty Corp. *See* Marks v. Walter G. McCarty Corp.

Walters v. Marler (1978) 83 C.A.3d 1, 462

Ward v. Taggart (1959) 51 C.2d 736, 83

Warren v. Merrill (2006) 143 C.A.4th 96, 38

Warrington Lumber Co. v. Fullerton Mtg. & Escrow Co. (1963) 222 C.A.2d 706, 467

Warrington v. Transamerica Title Ins. Co. (1979) 546 P.2d 627, 466

Warsaw v. Chicago Metallic Ceilings Inc. (1984) 35 C.3d 564, 409

Washington Mutual Bank v. Jacoby (2009) 120 C.A.4th 639, 364

Webber v. Inland Investments Inc. (1999) 74 C.A.4th 884, 336

Weeks. *See* Nussbaum v. Weeks

Weitzen. *See* Miller v. Weitzen

Wellenkamp v. Bank of America (1978) 21 C.3d 943, 330

Weller. *See* Classen v. Weller

Wells Fargo Bank v. PAL Investments Inc. (1979) 96 C.A.3d 431, 370

Welsch v. Goswick (1982) 130 C.A.3d 398, 442

Western Seven Trees Corp. *See* O'Hara v. Western Seven Trees Corp.

Western Title Ins. Co. *See* White v. Western Title Ins. Co.

White v. Criddlebaugh (2009) 175 C.A. 4th 1535, 377

White v. Western Title Ins. Co. (1985) 40 C.3d 870, 467

Wiegmann & Rose International Corp. v. NL Industries, Inc. (1990) 735 F. Supp. 957, 288

Williams. *See* Hubert v. Williams

Williams. *See* Norris v. Williams

William v. Puccinelli (1965) 236 C.A.2d 512, 172

Wilson v. Gentile (1992) 8 C.A.4th 759, 157
 Wilson v. Handley (2002) 97 C.A.4th 1301, 393
 Wilson v. Hisey (1957) 147 C.A.2d 433, 83
 Wilson v. Steele (1989) 211 C.A.3d 1053, 330
 Winet v. Roberts (1986) 179 C.A.3d 909, 363
 Witkin & Neal. *See* Multani v. Witkin & Neal
 Wolff. *See* Levy v. Wolff
 Wolfson. *See* Marina Point, Ltd. v. Wolfson
 Wong. *See* Greenwich S.F. LLC v. Wong
 Wong. *See* Reese v. Wong
 Woodill. *See* Scarborough v. Woodill

Woodridge Plaza LLC. *See* California National Bank v. Woodridge Plaza LLC
 World Savings. *See* Garcia v. World Savings
 Wright. *See* Cordano v. Wright
 Wu v. Interstate Consol. Indus. (1991) 226 C.A.3d 1511, 506
 Wyatt v. Union Mortgage Company (1979) 24 C.3d 773, 84
 Wylie v. Gresch (1987) 191 C.A.3d 412, 486

Y

Yamaga. *See* Cline v. Yamaga
 Yeoman v. Sawyer (1950) 99 C.A.2d 43, 291

Yokohama Specie Bank Ltd. v. Higashi (1943) 56 C.A.2d 709, 242
 Yosemite Park. *See* Pau v. Yosemite Park
 Young. *See* Hofer v. Young
 Yu. *See* Kumar v. Yu

Z

Zak. *See* Smith v. Zak
 Zaklama. *See* Palmer v. Zaklama
 Zang v. Northwestern Title Co. (1982) 135 C.A.3d 159, 466
 Zinnemann. *See* forsalebyowner.com Corporation v. Zinnemann
 Zlotoff v. Tucker. *See* Alamo School District v. Jones
 Zlotoff v. Tucker (1984) 154 C.A.3d 988, 172
 Zukin Corp. *See* Korens v. Zukin Corp.

SUBJECT INDEX OF CASES

A

Acceptance (of offer)

Gibbs v. American Savings (1990) 217 C.A.3d 1372, 148
Roth v. Malson (1998) 67 C.A.4th 552, 149

Acceptance (by fax)

Hofer v. Young (1995) 38 C.A.4th 52, 147

Acknowledgment

Clements v. Snider (1969) 409 F.2d 549, 254
Cordano v. Wright (1911) 159 C. 610, 302

Administrative Agency Power

Riley v. Chambers (1919) 181 C. 589, 10

After-Acquired Title

Emeric v. Alvarado (1891) 90 C. 444, 321

Adverse Possession

Aguayo v. Amaro (2013) 231 C.A. 4th 1102, 310
Hacienda Ranch Homes v. Superior Court (2013) 198 C.A. 4th 1122, 322
Hagman v. Meyer Mount Corporation (2013) 215 C.A. 4th 82, 322

Agency

Agent as Buyer

Gray v. Fox (1984) 151 C.A.3d 482, 84
Horning v. Shilberg (2005) 13 C.A. 4th 197, 63
In re Estate of De Harte (1961) 196 C.A.2d 452, 63

Roberts v. Lomanto (2003) 112 C.A. 4th 1553, 39

Smith v. Zak (1971) 20 C.A.3d 785, 49
Coupled with an Interest

Pacific Landmark Hotel, Ltd v. Marriott Hotels, Inc. (1993) 19 C.A.4th 615, 47

Disclosure

Brown v. FSR Brokerage, Inc. (1998) 62 C.A.4th 766, 32
Huijers v. DeMarrais (1993) 11 C.A.4th 676, 32

L. Byron Culver & Assoc. v. Jaoudi Industrial & Trading Corporation (1991) 1 C.A.4th 300, 36

Disclosure (to buyer)

Easton v. Strassburger (1984) 152 C.A.3d 90, 42
Geernaent v. Mitchell (1995) 31 C.A.4th 601, 73
Jue v. Smiser (1994) 23 C.A.4th 312, 75
Strebel v. Brenlar (2006) 135 C.A. 4th 740, 40

Duty to Buyer

Crogan v. Metz (1956) 47 C.2d 398, 49
Field v. Century 21 Klowden-Forness Realty (1998) 63 C.A.4th 18, 42
Ford v. Courmale (1974) 36 C.A.3d 172, 77

Furla v. Jon Douglas Co. (1998) 65 C.A.4th 1069, 40

Holmes v. Summer (2010) 188 C.A. 4th 1510, 86

Godfrey v. Steinpress (1982) 128 C.A.3d 154, 83

Merrill v. Buck (1962) 58 C.2d 552, 84
Mitchell v. Gould (1928) 90 C.A. 647, 37

People v. Sipper (1943) 61 C.A.2d 844, 84

Wilson v. Hisey (1957) 147 C.A.2d 433, 83

Duty to Principal

Banville v. Schmidt (1974) 37 C.A.3d 92, 50
Bate v. Marsteler (1959) 175 C.A.2d 573, 49

Carleton v. Tortosa (1993) 14 C.A.4th 745, 61

Foggy v. Ralph F. Clark & Assoc., Inc. (1987) 192 C.A.3d 1204, 50

Inter Mountain Mortgage, Inc. v. Salimen (2000) 78 C.A.4th 1434, 50

Mitchell v. Gould (1928) 90 C.A. 647, 37

Moore v. Turner (1952) 137 WV 299 71 S.E.2d 342, 48

Schoenberg v. Romike Properties (1967) 251 C.A.2d 154, 59

Sierra Pacific Industries v. Carter (1980) 104 C.A.3d 579, 48, 84

Spraltin v. Hawn (1967) 156 S. E.2d 402, 48

Wyatt v. Union Mortgage Company (1979) 24 C.3d 773, 84

Duty to Third Parties

Coldwell Banker Residential Brokerage Co. Inc. v. Superior Court (2004) 117 C.A.4th 158, 83

Jacobs v. Coldwell Banker Residential Brokerage Co (2017) 14 CA App. 5th 438, 43

People v. Jaquez (1984) 163 C.A.3d 918, 50

Fraud of Agent

Ach v. Finkelstein (1968) 264 C.A.2d 667, 45

Jorgensen v. Beach "N" Bay Realty, Inc. (1981) 125 C.A.3d 155, 49

Smith v. Zak 1971 20 C.A.3d 785, 49

Gratuitous

McPhetridge v. Smith (1929) 101 C.A. 122, 35

Independent Contractor

Barry v. Raskov (1991) 232 C.A.3d 447, 57

Liability of Principal

Walker v. Crigler (1992) 976 F.2d 900, 44

Ratification

Behniwal v. Mix (2005) 133 C.A. 4th 1027, 31

Salesperson's Status

Grubb & Ellis Company v. Spengler (1983) 143 C.A.3d 890, 57

Americans with Disabilities Act

Coronado v. Cobblestone Village Community Rentals LP (2008) 163 C.A. 4th 831, 127

Jankey v. Twentieth Century Fox Film Corporation (2000) 212 F.3d 1159, 135

Lentini v. California Center for the Arts, Escondido (2004) 370 F. 3d 837, 135

Lonberg v. Sanborn Theatres, Inc. (2001) 259 F.3d 1029, 127

Long v. Coast Resorts, Inc. (2002) 267 F.3d 918, 126

Madden v. Del Taco, Inc. (2007) 150 C.A. 4th 294, 126

U.S. v. Causby (1946) 328 U.S. 256, 239

Arbitration

Moore v. First Bank of San Luis Obispo (1998) 68 C.A.4th 768, 22

Harper v. Ultimo (2004) 113 C.A.4th 1402, 173

Villa Vicenza Homeowners Association v. Nobel Court Development LLC (2016) 191 CA 4th 963, 22

As Is

Assilzadeh v. California Federal Bank (2000) 82 C.A.4th 399, 86

Katz v. Department of Real Estate (1979) 96 C.A.3d 895, 133

Assignment and Sublease

Ilkhchooyi v. Best (1995) 37 C.A.4th 395, 508

Kendall v. Ernest Pestana, Inc. (1985) 40 C.3d 488, 481

Attachment

Becker v. Lindsay (1976) 16 C.3d 188, 386

Randone v. Appellate Dept. (1971) 5 C.3d 536, 372

Attorney Fees

Paul v. Schoellkopf (2005) 128 C.A.4th 147, 218

B**Boundaries**

Armitage v. Decker (1990) 218 C.A.3d 887, 392

Booska v. Patel (1994) 24 C.A.4th 1786, 393

Noronha v. Stewart (1988) 199 C.A.3d 485, 409

Scarborough v. Woodill (1907) 7 C.A.39 408

Tremper v. Quinones (2004) 115 C.A.4th 994, 409

Wilson v. Handley (2002) 97 C.A.4th 1301, 393

Broker's Duty to Other Brokers

Ballou v. Masters Props. No 6 (1987) 189 C.A.3d 65, 85

Building Permit

Ali v. City of Los Angeles (1999) 77 C.A.4th 246, 444

Buyer's Duty

Gray v. Fox (1984) 151 C.A.3d 482, 84

Nussbaum v. Weeks (1989) 214 C.A.3d 1589, 81

C**Civil Rights Act of 1866**

Jones v. Mayer (1968) 392 U.S. 409, 118

Coastal Zone Conservation Act

AVCO Community Developers, Inc. v. South Coast Regional Commission (1976) 17 C.3d 785, 437

Feduniak v. California Coastal Commission (2007) 148 C.A. 4th 1346, 437

Grupe v. California Coastal Commission (1985) 166 C.A.3d 148, 436

Nollan v. California Coastal Commission (1987) 107 S. Ct. 3141, 436

Ocean Harbor House Homeowners Association v. California Coastal Commission (2008) 163 C.A. 4th 215, 437

Commission

Cline v. Yamaga (1979) 97 C.A.3d 239, 132

Common Law

In re Patterson's Estate 34 C.A.2d 305, 9

Community Property

Andrade Development Co. v. Martin (1982) 188 C.A.3d 330, 292

Estate of Leslie (1984) 37 C.3d 186, 267

Estate of Vargas (1974) 36 C.A.3d 714, 267

In re Marriage of Branco (1996) 47 C.A.4th 1621, 266

In re Marriage of Campbell (1999) 74 C.A.4th 1621, 269

In re Marriage of Stitt (1983) 147 C.A.3d 579, 267

In re Marriage of Tallman (1994) 22 C.A.4th 1697, 293

Marriage of Broderick (1989) 209 C.A.3d 489, 292

Marriage of Rico (1992) 10 C.A.4th 706, 266

Marvin v. Marvin (1976) 18 C.3d 660, 268

Conditional-Use Permit

City of Cleburne v. Cleburne Living Centers, Inc. (1985) 473 U.S. 432, 420

Griffin Dev. Co. v. City of Oxnard (1985) 39 C.3d 256, 423

Condition Subsequent

Alamo School District v. Jones (1960) 182 C.A.2d 180, 244

Springmeyer v. City of South Lake Tahoe (1982) 132 C.A.3d 375, 244

Condominium Conversion

Griffin Dev. Co. v. City of Oxnard (1985) 39 C.3d 256, 423

Krater v. City of Los Angeles (1982) 130 C.A.3d 839, 442

Constitution

Marbury v. Madison (1803) 1 Cranch 137, 13

Constructive Eviction

Kinney v. Vaccari (1980) 27 C.3d 348, 507

Constructive Notice

Gates Rubber Co. v. Ulman (1989) 214 C.A.3d 356, 249

Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co. (1966) 177 C.A.2d 353, 254

Thomas v. Speck (1941) 47 C.A.2d 512, 254

Consumer Recovery Fund

Armenta v. Edmonds (1988) 201 C.A.3d 464, 134

Direnfield v. Stabile (1988) 198 C.A.3d 126, 106

Froid v. Fox (1982) 132 C.A.3d 832, 133
 Powers v. Fox (1979) 96 C.A.3d 440, 133
 Rodriguez v. Calif. Dept. of Real Estate
 (1997) 51 C.A.4th 1289, 134
 Stewart Title Guaranty Co. v. Park
 (2001) 250 F.3d 1249, 134
 Vinci v. Edmonds (1986) 185 C.A.3d
 1251, 134
Contracts
Acceptance
 Marcus Millichap Real Estate Investment
 Brokerage Co. v. Hock Investment
 Co. (1998) 68 C.A.4th 83, 174
 Nash v. Superior Court (1978) 86 C.A.
 3d 690, 148
Capacity
 Burnand v. Irigoyen (1947) 30 C.2d 861,
 173
Consideration
 Smith. See Kuish v. Smith
 Borelli v. Brusseau (1993) 12 C.A.4th
 647, 174
Contract of Adhesion
 Jaramillo v. JH Real Estate Partners, Inc.
 (2003) 3 Cal. Rptr. 3d 525, 159
Counteroffer
 Roth v. Malson (1998) 67 C.A.4th 552,
 149
Damages
 Erlich v. Menezes (1999) 21 C.4th 543,
 161
 Greenwich SF LLC v. Wong (2010) 190
 C.A. 4th 739, 174
 Kuish v. Smith (2010) 181 C.A. 4th
 1419, 162
 Storage Services v. C. R. Oosterbaan et
 al. (1989) 214 C.A.3d 498, 162
 Zlotoff v. Tucker (1984) 154 C.A.3d 988,
 172
Interpretation
 Gutzie Assoc. v. Switer (1989) 215
 C.A.3d 1636, 157
 Wilson v. Gentile (1992) 8 C.A.4th 759,
 157
Mutual Agreement
 Burgess v. Rodom (1953) 121 C.A.2d
 71, 173
 Sterling v. Taylor (2007) 40 C.A. 4th
 757, 150

Mutual Mistake
 Balistreri v. Nevada Livestock Prod
 Credit Ass'n. (1989) 214 C.A.3d 635,
 174
 Levy v. Wolff (1956) 46 C.2d 367, 152
 William v. Puccinelli (1965) 236 C.A.2d
 512, 172
Reformation
 Shupe v. Nelson (1967) 254 C.A.2d 693,
 172
Restraint on Alienation
 Zlotoff v. Tucker (1984) 154 C.A.3d 988,
 172
Revocation
 Ersa Grae Corp. v. Flour Corp. (1991) 1
 C.A.4th 613, 150
Specific Performance
 BD Inns v. Pooley (1990) 218 C.A.3d
 289, 21, 163
 Gilbert v. Mercer (1960) 179 C.A.2d 29,
 164
Statute of Frauds
 ARYA Group, Inc. v. Cher (2000) 77
 C.A.4th 610, 167
 Franklin v. Hansen (1963) 59 C.2d 570,
 172, 182
 Landes Constr. Co. v. Royal Bank (1987)
 833 F.2d 1365, 173
 Marks v. Walter G. McCarty Corp.
 (1949) 33 C.2d 814, 173
 Phillippe v. Shapell Indus. Inc. (1987) 43
 C.3d 1247, 30, 168
 Seck v. Foulks (1972) 25 C.A.3d 556,
 166
Unconscionable
 Flores v. Transamerica Home First Inc.
 (2001) 93 C.A.4th 846, 159
 Jaramillo v. JH Real Estate Partners, Inc.
 (2003) 3 Cal. Rptr. 3d 525, 159
 Salton Bay Marina v. Imperial Irr. Dist.
 (1985) 172 C.A.3d 914, 163
**Covenants, Conditions, and
 Restrictions**
 Bernardo Vilas Mgmt Corp. v. Black
 (1987) 190 C.A.3d 153, 443
 Broadmoor San Clemente Homeowners
 Assn. v. Nelson (1994) 25 C.A.4th
 1, 444
 City of Oceanside v. McKenna (1989)
 215 C.A.3d 1420, 443

Cunningham v. Superior Court (1998)
 67 C.A.4th 743, 279
 Edmond's of Fresno v. McDonald Group
 Ltd. (1985) 171 C.A.3d 598, 426
 Francis T. v. Village Green Owner's Ass'n
 (1986) 42 C.3d 490, 443
 Liebler v. Point Loma Tennis Club
 (1995) 40 C.A.4th 1600, 429
 Martin v. Bridgeport Community Asso-
 ciation (2009) 173 C.A. 4th 1024,
 426
 Norris v. Williams (1947) 54 A.2d 331,
 441
 Shelley v. Kraemer (1948) 334 U.S. 1,
 427
 Spitzer v. Kentwood Home Guardians
 (1972) 24 C.A.3d 215, 291
 Welsch v. Goswick (1982) 130 C.A.3d
 398, 442

D

Dedication

Dolan v. City of Tigard (1994) 114 S. Ct.
 2309, 308
 Selby Realty v. City of San Buenaventura
 (1973) 10 C.3d 100, 442

Deed (delivery)

Brown v. Sweet (1928) 95 C.A. 117, 301
 Huth v. Katz (1947) 30 C.2d 605, 321
 Stone v. Daily (1919) 181 C. 571, 301

Deed (description)

Lehman v. Kamp (1969) 273 C.A.2d
 701, 321

Deed (forgery)

Handy v. Shiells (1987) 190 C.A.3d 512,
 322

Lee v. Lee (2009) 175 C. A. 4th 1553,
 306

Montgomery v. Bank of America (1948)
 85 C.A.2d 559, 321

People v. Sanders (1998) 67 C.A.4th
 1403, 300

Deed (fraud)

Anderson v. Reynolds (1984) 588 F.
 Supp. 814, 307
 Johnson v. Johnson (1987) 192 C.A.3d
 551, 322

Deed (not to be recorded)

McCarthy v. Security Trust & Savings
 Bank (1922) 188 C. 229, 321

Deed of Reconveyance

Pintor v. Ong (1989) 211 C.A.3d 837, 341

Deficiency Judgment

Altus Bank v. State Farm Fire and Cas Co. (1991) 758 F. Supp. 567, 339
 Cadlerock Joint Ventures LP v. Lobel (2012) 206 C.A. 4th 1531, 364
 Cornelison v. Kornbluth (1975) 15 C.3d 590, 345
 Enloe v. Kelso (2013) 217 C.A. 4th 877, 338
 First Commercial Mortgage Co. v. Reece (2001) 89 C.A.4th 731, 339
 Kurtz v. Calvo (1999) 75 C.A.4th 191, 363
 Locke v. Klunker (1898) 123 C. 231, 363
Definiteness (of agreement)
 ETCO Corporation v. Hauer (1984) 161 C.A.3d 1154, 151
 Goodyear Rubber Corporation v. Munoz (1985) 170 C.A.3d 919, 151

Demolition Permit

Ali v. City of Los Angeles (1999) 77 C.A.4th 246, 444

Department of Real Estate

Brown v. Gordon (1966) 240 C.A.2d 659, 94

Developer Liability

AVNER v. Longridge Estates (1982) 272 C.A.2d 607, 438
 La Jolla Village Homeowners' Ass'n., Inc. v. Superior Court (1989) 212 C.A.3d 1131, 439

Development Agreement

Pardee Construction Co. v. City of Camarillo (1984) 37 C.3d 465, 443

Due-on-Sale Clause

Fidelity Federal Savings & Loan v. de la Cuesta (1982) 458 U.S. 141, 331
 Rubin v. Los Angeles Federal Savings and Loan et al. (1984) 159 C.A.3d 292, 331
 Wellenkamp v. Bank of America (1978) 21 C.3d 943, 330

Development Fees

616 Croft Ave LLC v. City of West Hollywood (2016) 3 CA 5th 621, 444

Dual Agency

Horiike v. Coldwell Banker (2016) 11 CA 5th 1024, 44

Due Process

Cook v. City of Buena Park (2005) 126 C.A. 4th 1, 22
 Sylvia Landfield Trust v. City of Los Angeles, (2013) 729 F.3d 1189, 509

E**Easements**

Boxer v. City of Beverly Hills (2016) 246 CA 4th 1212, 410
 Brewer v. Murphy (2008) 161 C.A. 4th 928, 409
 Collier v. Oelke (1962) 202 C.A.2d 843, 407
 Connolly v. McDermott (1984) 162 C.A.3d 973, 401
 Dieterich International Truck Sales v. J. S. & J. Services, Inc. (1992) 3 C.A.4th 1601, 401
 Dubin v. Robert Newhall Chesebrough Trust (2001) 96 C.A.4th 465, 403
 Echevarrieta v. City of Rancho Palos Verdes (2001) 86 C.A.4th 472, 444
 Hoffman v. 162 North Wolfe LLC (2014) 228 C.A. 4th 1178, 86
 Ingwersen v. Barry (1897) 118 C. 342, 409
 Krieger v. Pacific Gas & Electric Co. (1981) 119 C.A.3d 137, 409
 MacDonald Properties Inc. v. Bel Air Country Club (1977) 72 C.A.3d 693, 408
 Masin v. LaMarche (1982) 136 C.A.3d 687, 403
 Muzio v. Erickson (1919) 41 C.A. 413, 408
 Otay Water District v. Beckwith (1991) 1 C.A.4th 1041, 402
 Salvaty v. Falcon Television (1985) 165 C.A.3d 798, 399
 San Diego Gas and Electric Co. v. Superior Court (1996) 13 C.4th 893, 409
 Spar v. Pacific Bell (1991) 235 C.A.3d 1480, 409
 Surfrider Foundation v. Martins Beach (2017) 14 CA 5th 238, 408
 Vanklompberg v. Berghold (2005) 126 C.A. 4th 345, 398
 Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 C.3d 564, 409

Eminent Domain

Baldwin Park Redev. Agency v. Irving (1984) 156 C.A.3d 428, 322
 City of San Diego v. Sobke (1998) 65 C.A.4th 379, 311
 Fidelity Federal Savings & Loan v. de la Cuesta (1982) 458 U.S. 141, 331
 Jefferson Street Ventures, LLC v. City of Indio (2015) 236 C.A. 4th 175, 322
 People ex rel. Dept. of Transportation v. Muller (1984) 36 C.3d 263, 321
 U.S. v. 564 acres of land (1979) 99 S. Ct. 1854, 321
 U.S. v. 967.905 acres of land (1969) 305 F. Supp. 83, 321

Encroachment

Booska v. Patel (1994) 24 C.A.4th 1786, 393
 Fire Insurance Exchange v. Superior Court (2010) 181 C.A. 4th 388, 410
 Hirshfield v. Schwartz (2001) 91 C.A.4th 749, 394
 Tremper v. Quinones (2004) 115 C.A.4th 944, 409

Environmental Impact Statement

No GWEN Alliance v. Aldridge (1988) 855 F.2d 1380, 435

Escrow (duties)

Axley v. Transamerica Title Ins. Co. (1978) 88 C.A.3d 1, 466
 Christenson v. Commonwealth Land Title Insurance Company (1983) 666 P.2d 302, 455
 Contemporary Invs., Inc. v. Safeco Title Ins. Co. (1983) 145 C.A.3d 999, 465
 Cunningham v. Security Title Ins. Co. (1966) 241 C.A.2d 626, 466
 First National Bank of La Habra v. Caldwell (1927) 84 C.A. 438, 456
 In re Marriage of Cloney (2001) 91 C.A.4th 434, 455
 Kish v. Bay Counties Title Guaranty Co. (1967) 254 C.A.2d 725, 465
 Lee v. Escrow Consultants, Inc. (1989) 210 C.A.3d 915, 454
 Lee v. Title Insurance & Trust Co. (1968) 264 C.A.2d 160, 466
 Riando v. San Benito Title Guarantee Co. (1950) 35 C.2d 170, 466
 Wade v. Lake County Title Co. (1970) 6 C.A.3d 824, 467

Warrington Lumber Co. v. Fullerton Mtg. & Escrow Co. (1963) 222 C.A.2d 706, 467

Warrington v. Transamerica Title Ins. Co. (1979) 546 P.2d 627, 466

Zang v. Northwestern Title Co. (1982) 135 C.A.3d 159, 466

Estate Sale

Estate of Lopez (1992) 8 C.A.4th 317, 318

Eviction

Barela v. Superior Court (1981) 30 C.3d 244, 505

Camacho v. Shaefer (1987) 193 C.A.3d 718, 494

Chen v. Kraft (2016) 24 CA 4th 13, 496

City of South San Francisco Housing Authority v. Guillory (1996) 41 C.A.4th 13, 507

Green v. Superior Court (1974) 10 C.3d 616, 506

Hyatt v. Tedesco (2002) 96 C.A.4th Supp. 62, 485

Schulman v. Vera (1980) 108 C.A.3d 552, 492

Segalas v. Moriarty (1989) 211 C.A.3d 1583, 498

Vargas v. Municipal Court (1978) 22 C.3d 902, 497

Exculpatory Clause

Burnett v. Chimney Sweep, LLC (2004) 123 C.A.4th 1057, 477

F

Fair Housing

Auburn Woods I Homeowners Association v. Fair Employment and Housing Council (2004) 121 C.A.4th 1578, 120

Fair Housing Council of Orange County, Inc. v. Ayres (1994) 855 F. Supp. 315 125

Giebler v. M&B Association a Limited Partnership (2003) 343 F.3d 1143, 120

Gilligan v. Jamco Development Corporation (1997) 108 F.3d 246, 125

Harrison v. Commonwealth Land Title Ins. Co. (1979) 97 C.A.3d 973, 459

Housing Rights Center v. Donald Sterling Corp. (2003) 274 F. Supp. 2d 1129, 135

Hubert v. Williams (1982) 133 C.A.3d Supp. 1, 129

Jones v. Mayer (1968) 392 U.S. 409, 118

Lentini v. California Center for the Arts, Escondido (2004) 370 F.3d 837, 135

Pfaff v. U.S. Department of Housing and Urban Development (1996) 88 F.3d 739, 122

Taylor v. Rancho Santa Barbara (2000) 206 F.3d 932, 119

Town of Huntington v. Huntington Branch, NAACP (1989) 488 U.S. 15, 134

U.S. v. California Mobile Home Park Management Co. (1994) 29 F.3d 1413, 134

Familial Status

Smith v. Fair Employment & Housing Commission (1996) 12 C.4th 1143, 130

Smith v. Ring Bros. Management Corp. (1986) 183 C.A.3d 649, 134

Taylor v. Rancho Santa Barbara (2000) 206 F.3d 932, 119

Finder's Fee

Grant v. Marinell (1980) 112 C.A.3d 617, 229

Salazar v. Interland (2007) 152 C.A. 4th 1031, 115

Tenzer v. Superscope, Inc. (1985) 39 C.3d 18, 81

Tyrone v. Kelley (1973) 9 C.A.3d 1, 230

First Amendment

Allred v. Harris (1993) 14 C.A.4th 1386, 21

Bank of Stockton v. Church of Soldiers of the Cross of Christ (1996) 44 C.A.4th 1623, 5

City of Ladue v. Gilleo (1994) 114 S. Ct. 2038, 22

Golden Gateway Center v. Golden Gateway Tenants Association (1999) 73 C.A.4th 908, 22

Greater Baltimore Board of REALTORS® v. Baltimore County (1990) 752 F. Supp. 193, 4

Maldonado v. Kempton (2006) 422 F. Supp. 1169, 5

Paradise Hills Associates v. Procel (1991) 235 C.A.3d 1528, 21

Pruneyard Shopping Center v. Robbins (1980) 447 U.S. 74, 4

Savage v. Trammell Crow Co., Inc. (1990) 223 C.A.3d 1562, 21

Van v. Target Corp. (2007) 155 C.A. 4th 1375, 6

Fifth Amendment

Kelo v. City of New London (2005) 125 S. Ct. 2655, 6

Fixtures

Allstate Ins. Co. v. County of Los Angeles and Security Nat'l Bank v. County of Los Angeles (1984) 161 C.A.3d 877, 241

Larkin v. Cowert (1968) 263 C.A.2d 27, 240

Seatrail Terminal of California, Inc. v. County of Alameda (1978) 83 C.A.3d 69, 240

Foreclosure

6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 C.A.4th 1279, 364

Bank of America v. Daily (1984) 152 C.A.3d 767, 344

Barberi v. Rothchild (1939) 7 C.2d 537, 362

CTC Real Estate Services v. Lepe (2006) 140 C.A. 4th 856, 344

Garcia v. World Savings (2010) 183 C.A. 4th 1031, 349

Jones v. Wachovia Bank (2014) 238 C.A. 4th 935, 364

Lo v. Jensen (2001) 88 C.A.4th 1093, 343

Mabry v. Superior Court (2010) 165 C.A. 4th 208, 342

Moller v. Lien (1994) 25 C.A.4th 822, 363

Nippon Credit Bank v. 1333 N. California Blvd. (2001) 86 C.A.4th 486, 363

O'Meara v. De La Mater (1942) 52 C.A.2d 665, 362

Pike v. Tuttle (1971) 18 C.A.3d 746, 362

Washington Mutual Bank v. Jacoby (2009) 120 C.A. 4th 639, 364

Webber v. Inland Investments, Inc. (1999) 74 C.A.4th 884, 336

Foreclosure Consultants

In re Wallace Reed Phelps (2001) 93 C.A.4th 451, 348
 United States v. Miller (1982) 676 F.2d 359, 362

Foreclosure of Lien

Superior Lumber Co. v. Sutro (1979) 92 C.A.3d 954, 385

Foreclosure (one form of action)

Bank of America v. Daily (1984) 152 C.A.3d 767, 344

Fourteenth Amendment

Cook v. City of Buena Park (2005) 126 C.A. 4th 1, 22

Fourth Amendment

People v. Lucatero (2008) 166 C.A. 4th 1110, 22

Fraud

Manderville v. PCG&S Group, Inc. (2007) 146 C.A. 4th 1486, 78
 Salahutin v. Valley of Calif., Inc. (1994) 24 C.A.4th 555, 75
 U.S. v. Cloud (1989) 872 F.2d 846, 155
 U.S. v. Peterson (2008) 538 F. 3d 1064, 77
 Ward v. Taggart (1959) 51 C.2d 736, 83

G**Government Seizure**

U.S. v. 3814 N.W. Thurman St. (1999) 164 F.3d 1191, 314
 U.S. v. James Daniel Good (1993) 114 S. Ct. 492, 314

H**Habitability**

City and County of San Francisco v. Sainez (2000) 77 C.A. 4th 1302, 485
 Espinoza v. Calva (2008) 169 C.A. 4th 1393, 485
 Hyatt v. Tedesco (2002) 96 C.A.4th Supp. 62, 485

Hazardous Waste

United States of America v. Maryland Bank & Trust (1986) 632 F. Supp. 573, 288
 Wiegmann & Rose International Corp. v. NL Industries, Inc. (1990) 735 F. Supp. 957, 288

Holder in Due Course

Wilson v. Steele (1989) 211 C.A.3d 1053, 330

Homestead

Becker v. Lindsay (1976) 16 C. 3d 188, 386
 Gardner v. Johnson (1952) 195 F.2d 717, 386
 In re Howell (1980) 638 F.2d 81, 382
 In re Rabin (2006) 336 B. R. 459, 382
 Little v. Community Bank (1992) 234 C.A.3d 355, 371
 Skinner v. Hall (1886) 69 C. 195, 384

Homeowners' Association

Dover Village Assn. v. Jennison (2010) 191 C.A. 4th 123, 280
 Huntington Continental Town House Association v. Miner (2014) 230 C.A. 4th 590, 293
 Multani v. Witkin & Neal (2013) 215 C.A. 4th 1428, 280
 Rancho Santa Fe Association v. Dolan-King (2004) 115 C.A. 4th 28, 444
 Spitzer v. Kentwood Home Guardians (1972) 24 C.A.3d 215, 291
 Sui v. Price (2011) 196 C.A. 4th 933, 280

I**Inverse Condemnation**

Dina v. People ex. rel. Dept. of Transp. (2007) 151 C.A. 4th 1029, 312
 Gilbert v. State (1990) 218 C.A.3d 234, 313
 Regency Outdoor Advertising, Inc. v. City of Los Angeles (2006) 39 C.A. 4th 507, 312
 U.S. v. 967.905 acres of land (1969) 305 F. Supp. 83, 321

J**Joint Tenancy**

Dimmick v. Dimmick (1962) 58 C.2d 417, 290
 Kane v. Huntley Financial (1983) 146 C.A.3d 1092, 291
 Marriage of Rico (1992) 10 C.A.4th 706, 266
 Riddle v. Harmon (1980) 102 C.A.3d 524, 264
 Yeoman v. Sawyer (1950) 99 C.A.2d 43, 291

Judgment (execution)

Nutt v. Nutt (1966) 247 C.A.2d 166, 386

L**Landlord Duties**

City and County of San Francisco v. Sainez (2000) 77 C.A.4th 1302, 485
 Dromy v. Lukovsky (2013) 219 CA 4th 278, 483
 Kinney v. Vaccari (1980) 27 C.3d 348, 507
 People v. Roman (1991) 227 C.A. 3d 674, 506
 Schulman v. Vera (1980) 108 C.A.3d 552, 492

Landlord Liability

Amos v. Alpha Property Management (1999) 73 C.A.4th 895, 508
 Andrews v. Mobile Aire Estates (2004) 125 C.A.4th 578, 508
 Annocki v. Peterson Enterprises LLC (2014) 232 C.A. 4th 32, 284
 Barber v. Chang (2007) 151 C.A. 4th 1456, 489
 Barnes v. Black (1999) 71 C.A.4th 1473, 487
 Castaneda v. Olsher (2007) 41 C. 4th 1205, 490
 Cregg v. Ministor Ventures (1983) 148 C.A.3d 110, 505
 Davis v. Gomez (1989) 207 C.A.3d 1401, 489
 Fairchild v. Park (2001) 90 C.A.4th 919, 508
 Lundy v. California Realty (1985) 170 C.A.3d 813, 486
 Madhani v. Cooper (2003) 106 C.A.4th 412, 488
 McClain v. Octagon Plaza LLC (2008) 159 C.A. 4th 784, 509
 McDaniel v. Sunset Manor Co. (1990) 220 C.A.3d 1, 488
 Myrick v. Mastagni (2010) 185 C.A. 4th 1082, 491
 O'Hara v. Western Seven Trees Corp. (1977) 75 C.A.3d 798, 506
 Olar v. Schroit (1984) 155 C.A.3d 861, 506
 Penner v. Falk (1984) 153 C.A.3d 858, 486
 Peterson v. Superior Court (1995) 10 C.4th 1185, 486

Preston v. Goldman (1986) 42 C.3d 108, 285

Rosenbaum v. Security Pacific Corp. (1996) 43 C.A.4th 1084, 507

Swanberg v. O'Mectin (1984) 157 C.A.3d 325, 507

Tan v. Annel Management Co. (2008) 162 C.A. 4th 621, 487

Wylie v. Gresch (1987) 191 C.A.3d 412, 486

Landslide

Sprecher v. Adamson Cos. (1981) 30 C.3d 358, 408

Late Charge

Garrett v. Coast & Southern Federal Savings & Loan Ass'n. (1973) 9 C.3d 731, 362

Lead-Paint Disclosure

Smith v. Coldwell Banker Real Estate Services (2000) 122 F. Supp. 2d 267, 85

Lease (validity)

Scheerer v. Cuddy (1890) 85 C. 270, 507

License

Cooke v. Ramponi (1952) 38 C.2d 282, 406

Forsalebyowner.com Corporation v. Zinnemann (2005) 347 Fed Supp. 2nd 868, 135

License Denial

Brandt v. Fox (1979) 90 C.A.3d 737, 133

Donaldson v. California Department of Real Estate (2006) 134 C.A. 4th 948, 10

Pieri v. Fox (1979) 96 C.A.3d 802, 134

License Revocation

Golde v. Fox (1979) 98 C.A.3d 167, 133

Katz v. Department of Real Estate (1979) 96 C.A.3d 895, 133

Madrid v. Department of Real Estate (1984) 152 C.A.3d 454, 104

Realty Projects, Inc. v. Smith (1973) 32 C.A.3d 204, 103

Robbins v. Davi (2009) 175 C.A. 4th 118, 135

The Grubb Co. Inc. v. Department of Real Estate (2011) 194 C.A. 4th 1494, 135

Life Estates

Cole v. Cole (1956) 139 C.A.2d 691, 290

Green v. Brown (1951) 37 C.2d 391, 237, 290

King v. Hawley (1952) 113 C.A.2d 534, 245

Lowe v. Ruhlman (1945) 67 C.A.2d 828, 254

Osborne v. Osborne (1954) 42 C.2d 358, 246

Limited Liability Company

C.B. Ellis, Inc. v. Terra Nostra Consultants (2014) 230 C.A.4th 405, 294

Lis Pendens

Palmer v. Zaklama (2003) 109 C.A.4th 1367, 381

Listings

Buyer Agent (buyer default)

Chan v. Tsang (1991) 1 C.A.4th 1578, 231

Schaffter v. Creative Capital Leasing Group LLC (2008) 166 C.A. 4th 745, 193

Contingency Commission

City of Turlock v. Paul M. Zagaris, Inc. (1989) 209 C.A.3d 189, 183

Hughes v. Morrison (1984) 160 C.A.3d 103, 231

Exclusive Agency

Coldwell Banker and Co. v. Pepper Tree Office Center Assocs. (1980) 106 C.A.3d 272, 192

Listing/Option

Rattray v. Scudder (1946) 28 C.2d 214, 198

No Deal—No Commission

Lipton v. Johansen (1951) 105 C.A.2d 363, 229

R. J. Kuhl Corp. v. Sullivan (1993) 13 C.A.4th 1589, 183

Option to Avoid Commission

Anthony v. Enzler (1976) 61 C.A.3d 872, 195

Revocation of

Coleman v. Mora (1968) 263 C.A.2d 137, 228

Safety Clause

McKay and Company v. Garland (1986) 701 S. W.2d 392, 231

Sale after Expiration

Rose v. Hunter (1957) 155 C.A.2d 319, 229

Submitted

Duin v. Security First National Bank (1955) 132 C.A.2d 904, 229

Termination

Blank v. Borden (1974) 11 C.A.3d 963, 230

Merzoian v. Papazian (1921) 53 C.A. 112, 230

Termination Date

Nystrom v. First National Bank of Fresno (1978) 81 C.A.3d 759, 184

Verbal

Filante v. Kikendall (1955) 134 C.A.2d 695, 192

Grant v. Marinell (1980) 112 C.A.3d 617, 229

Owens v. Foundation for Ocean Research (1980) 107 C.A.3d 179, 229

Verbal Modification

Fidler v. Schiller (1963) 212 C.A.2d 569, 230

M

Mechanic's Lien (priority)

South Bay Engineering Corp. v. Citizens Sav. & Loan Assn. (1975) 51 C.A.3d 453, 386

Mechanics' Liens

Alatraste v. Cesar's Exterior Designs (2010) 183 C.A. 4th 656, 386

Ball v. Steadfast—BLK. (2011) 196 C.A. 4th 694, 386

Contractors Dump Truck Service, Inc. v. Gregg Construction Co. (1965) 237 C.A.2d 1, 385

Hydrotech Systems v. Oasis Waterpark (1991) 52 C.3d 988, 375

Loviet v. Seyforth (1972) 22 C.A.3d 841, 386

Marchant v. Hayes (1897) 117 C. 669, 386

MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Inc. (2005) 36 C.A. 4th 412, 374

Robinett v. Brown (1914) 167 C. 735, 385

Sanders Construction Co. v. Cerda (2009) 175 C.A. 4th 430, 376

Simons Brick Company v. Hitzel (1925) 72 C.A. 1, 380

South Bay Engineering Corp. v. Citizens Sav. & Loan Assn. (1975) 51 C.A.3d 453, 386

Superior Lumber Co. v. Sutro (1979) 92 C.A.3d 954, 385

Twentynine Palms Enterprises Corporation v. Bardos (2012) 210 C.A. 4th 1435, 376

White v. Criddlebaugh (2009) 175 C.A. 4th 1535, 377

Mineral, Oil, and Gas Rights

Geothermal Kinetics, Inc. v. Union Oil Co. (1977) 77 C. A.3d 56, 240

Mitigation of Damages

Kumar v. Yu (2011) 201 C.A. 4th 1463, 495

Mobile Home Park (rules)

Rancho Santa Paula Mobile Home Park Ltd. v. Evans (1994) 26 C.A.4th 1139, 508

Mortgage Loan Broker

Pacific Plan of California v. Kinder (1978) 84 C.A.3d 215, 133

Mortgage Redemption

Fry v. Bihl (1970) 6 C.A.3d 248, 362

Multiple Listing Service

Derish v. San Mateo–Burlingame Board (1982) 136 C.A.3d 534, 84

Marin County Board v. Polsson (1976) 16 C.3d 920, 79

People v. National Association of REALTORS® (1981) 120 C.A.3d 459, 83

United Multiple Listing Service v. Bernstein (1982) 134 C.A.3d 486, 84

Mutual Mistake (contracts)

Levy v. Wolff (1956) 46 C.2d 367, 152

N

Net Listing

Sierra Pacific Industries v. Carter (1980) 104 C.A.3d 579, 47, 84

Nonconforming Use

City of Los Angeles v. Gage (1954) 127 C.A.2d 442, 441

City of Stanton v. Cox (1989) 207 C.A.3d 1557, 425

Ebel v. City of Corona (1985) 767 F.2d 635, 425

Jones v. City of Los Angeles (1930) 211 C. 304, 424

Notice of Nonresponsibility

Baker v. Hubbard (1980) 101 C.A.3d 226, 369, 385

Los Banos Gravel Company v. Freeman (1976) 58 C.A.3d 785, 378

Nuisance

Boarts v. Imperial Irrigation District (1947) 80 C.A.2d 574, 408

Lew v. Superior Court (1993) 20 C.A.4th 866, 395

Mangini v. Aerojet General Corp. (1991) 230 C. A.3d 1125, 408

Wilson v. Handley (2002) 97 C.A.4th 1301, 393

O

Option

Patel v. Liebermensch (2008) 45 C. 4th 344, 195

Owner Liability

Bisetti v. United Refrigeration Corp. (1985) 174 C.A.3d 643, 291

Brunelle v. Signore (1989) 215 C.A.3d 122, 285

Cadam v. Sumerset Garden Townhouse HOA (2011) 200 C.A. 4th 383, 294

Donnell v. California Western School of Law (1988) 200 C.A.3d 715, 292

Garcia v. Holt (2015) 242 CA 4th 600, 509

Garcia v. Paramount Citrus Assn. (2008) 161 C.A. 4th 321, 293

Hubbard v. Brown (1990) 50 C.3d 189, 292

Leakes v. Shamoun (1986) 187 C.A.3d 772, 291

Lucas v. Pollock (1992) 7 C.A.4th 668, 293

Melton v. Boustred (2010) 183 C.A. 4th 521, 284

Padilla v. Rodas (2008) 160 C.A. 4th 742, 293

Pineda v. Ennabe (1998) 61 C.A.4th 1403, 293

Preston v. Goldman (1986) 42 C.3d 108, 285

Privette v. Superior Court (1993) 5 C.4th 689, 284

Salinas v. Martin (2008) 168 C.A. 4th 1098b, 283

Selger v. Steven Bros., Inc. (1990) 222 C.A.3d 1585, 292

Southland Corp. v. Superior Court (1988) 203 C.A.3d 656, 292

Wiegmann & Rose International Corp. v. NL Industries, Inc. (1990) 735 F. Supp. 957, 288

P

Partition Action

Butte Creek Island Ranch v. Crim (1982) 136 C.A.3d 360, 291

Formosa Corp. v. Rogers (1952) 108 C.A.2d 397, 265

Partnership

Bardis v. Oates (2004) 119 C.A.4th 1, 291

BT-1 v. Equitable Life Assurance Society (1999) 75 C.A.4th 1406, 274

Enea v. Superior Court (2005) 132 C.A. 4th 1559, 272

Jones v. Wagner (2001) 90 C.A.4th 466, 293

Power of Attorney

Sheetz v. Edmonds (1988) 201 C.A.3d 1432, 98

Prepayment Penalty

California Federal Bank v. Matreyek (1992) 8 C.A.4th 125, 363

Priority of Liens

Wells Fargo Bank v. PAL Investments Inc. (1979) 96 C.A.3d 431, 370

Probate Sale

Estate of Lopez (1992) 8 C.A.4th 317, 318

R

Real Estate Purchase Contracts

As Is Provision

Crawford v. Nastos (1960) 182 C.A.2d 659, 231

Shapiro v. Hu (1986) 188 C.A.3d 324, 221

Reese v. Wong (2001) 93 C.A.4th 52, 161

Contingency Rejection

Beverly Way Associates v. Barham (1990) 226 C.A.3d 49, 220

Lyon v. Giannoni (1959) 168 C.A.2d 336, 231

Financing Contingency

Fry v. George Elkins Company (1958) 162 C.A.2d 256, 219

Late Acceptance

Sabo v. Fasano (1984) 154 C.A.3d 502, 220

Tie-in Sale

Classen v. Weller (1983) 145 C.A.3d 27, 231

Real Property

Specialty Restaurants Corp. v. County of Los Angeles (1977) 67 C.A.3d 924, 254

U.S. v. Causby (1946) 328 U.S. 256, 239

Real Property Sales Contracts

Handy v. Gordon (1967) 65 C.2d 578, 362

MacFadden v. Walker (1971) 5 C.3d 809, 347

Petersen v. Hartell (1985) 40 C.3d 102, 347

Smith v. Allen (1968) 68 C.2d 93, 347

Recording

Hochstein v. Romero (1990) 219 C.A.3d 447, 252

Phelps v. American Mortgage Company (1936) 6 C.2d 604, 254

Recreational User Immunity

Hubbard v. Brown (1990) 50 C.3d 189, 292

Jensen v. Kenneth Mullen Co. (1989) 211 C.A.3d 653, 292

Klein v. United States of America (2010) 50 C. 4th 68, 291

Miller v. Weitzen (2005) 133 C.A. 4th 732, 286

New v. Consolidated Rock Prods. (1985) 171 C.A.3d 681, 287

Ornelas v. Randolph (1993) 4 C.4th 1095, 285

Pau v. Yosemite Park (1991) 928 F.2d 880, 292

Shipman v. Boething Treeland Farms Inc. (2000) 77 C.A.4th 1424, 286

Redlining

Harrison v. Heinzroth Mortgage Co. (1977) 430 F. Supp. 893, 121

Rent Control

Baychester Shopping Center, Inc. v. San Francisco Residential Rent Stabilization and Arbitration Board (2008) 165 C.A. 4th 1000, 509

Birkenfield v. City of Berkeley (1976) 17 C.3d 129, 501

Bisno v. Santa Monica Rent Control Board (2005) 130 C.A. 4th 816, 503

Channing Properties v. City of Berkeley (1993) 11 C.A.4th 88, 502

Foster v. Britton (2016) 242 CA 4th 920, 509

Guggenheim v. City of Goleta (2010) 638 F. 3d 1111, 502

Santa Monica Pines Ltd. v. Rent Control Board (1984) 35 C.3d 858, 507

Sterling v. Santa Monica Rent Control Board (1984) 162 C.A.3d 1021, 502

Vega v. City of West Hollywood (1990) 223 C.A.3d 1343, 506

Rent Formula

California National Bank v. Woodridge Plaza LLC (2008) 164 C.A. 4th 137, 508

Wu v. Interstate Consol. Indus. (1991) 226 C.A.3d 1511, 506

Revocation (of offer)

Ersa Grae Corp. v. Fluor Corp. (1991) 1 C.A.4th 613, 150

Right of First Refusal

Ellis v. Chevron U.S.A., Inc. (1988) 201 C.A.3d 132, 156

Mercer v. Lemmens (1964) 230 C.A.2d 167, 172

S**Salesperson's Status**

Grubb & Ellis Company v. Spengler (1983) 143 C.A.3d 890, 57

Sanowicz v. Bacal (2015) 234 C.A. 4th 1027, 58

Security Deposits (leases)

Granberry v. Islay Investments (1993) 18 C.A.4th 885, 508

Korens v. Zukin Corp. (1989) 212

C.A.3d 1054, 479

People v. Parkmerced Co. (1988) 198 C.A.3d 683, 479

Small Property Owners of San Francisco v. City and County of San Francisco (2006) 141 C.A. 4th 1388, 508

Seller's Duty to Buyer

Alexander v. McKnight (1992) 7 C.A.4th 973, 85

Jue v. Smiser (1994) 23 C.A.4th 312, 75

Sweat v. Hollister (1995) 37 C.A.4th

603, 85

Sexual Harassment

Beliveau v. Caras (1995) 873 F. Supp. 1393, 129

Subdivided Lands Law

People v. Byers (1979) 90 C.A.3d 140,

432

T**Tax Deed**

L & B Real Estate v. Housing Authority (2007) 149 C.A. 4th 950, 305

Tenant Duties

Brown v. Green (1994) 8 C.4th 812, 493

Hinson v. Delis (1972) 26 C.A.3d 62, 492

People v. Roman (1991) 227 C.A.3d 674, 506

Sachs v. Exxon Co. U.S.A. (1992) 9 C.A.4th 1491, 493

Schulman v. Vera (1980) 108 C.A.3d 552, 492

Tenant in Common

Black v. Black (1949) 91 C.A.2d 328, 261

Tenant Tax Relief Credit

Rue-Ell Enterprises v. City of Berkeley (1983) 147 C.A.3d 81, 507

Title Insurance

Kwok v. Transnation Title Insurance Co. (2009) 170 C.A. 4th 1562, 459

Soifer v. Chicago Title (2010) 187 C.A. 4th 365, 460

Southwest Title Ins. Co. v. Northland Bldg. Corp. (1976) 542 S.W.2d 436, 458

White v. Western Title Ins. Co. (1985) 40 C.3d 870, 467

Title Insurance (duty to defend)

Samson v. Transamerica Ins. Co. (1981) 30 C.3d 220, 466

Title Insurance (extended-coverage policy)

Lick Mill Creek Apartments v. Chicago Title Co. (1991) 231 C.A.3d 1654, 462

Walters v. Marler (1978) 83 C.A.3d 1, 462

Title Insurance (liability to third parties)

Harrison v. Commonwealth Land Title Ins. Co. (1979) 97 C.A.3d 973, 459

Soifer v. Chicago Title Co. (2010) 1870 C.A. 4th 365, 460

Title Insurance (preliminary title report)

Southland Title Corporation v. Superior Court (1991) 231 C.A.3d 530, 460

Trade Fixtures

Roberts v. Mills (1922) 56 C.A. 556, 242

Yokohama Specie Bank Ltd. v. Higashi (1943) 56 C.A.2d 709, 242

Transfer Disclosure Statement

Alexander v. McKnight (1992) 7 C.A. 4th 603, 85

Michel v. Moore & Associates (2007) 156 C.A. 4th 756, 71

Realmuto v. Gagnard (2003) 110 C.A.4th 193, 71

Shapiro v. Sutherland (1998) 60 C.A.4th 666, 83

Sweat v. Hollister (1995) 37 C.A.4th 603, 85

Trespass

Spar v. Pacific Bell (1991) 235 C.A.3d 1480, 409

Truth-in-Lending

Jackson v. Grant (1989) 876 F.2d 764, 357

Jones v. E* Trade Mortgage Corporation (2005) 397 F.3d 810, 358

Pacific Shore Funding v. Lozo (2006) 138 C.A. 4th 1342, 358

U**Unruh Act**

Harris v. Capital Growth Investors XIV (1991) 52 C.3d 1142, 133

Hubert v. Williams (1982) 133 C.A.3d Supp. 1, 129

J.B.B. Investment Partners LTD. v. Fair (2014) 232 C.A. 4th 971, 174

Marina Point, Ltd. v. Wolfson (1982) 30 C.3d 721, 129

Usury

Carboni v. Arrospide (1991) 2 C.A.4th 76, 109

Orlando v. Berns (1957) 154 C.A.2d 753, 363

People v. Asuncion (1984) 152 C.A.3d 422, 333

Stickel v. Harris (1987) 196 C.A.3d 575, 333

Winet v. Roberts (1986) 179 C.A.3d 909, 363

V**View**

Echevarrieta v. City of Rancho Palos Verdes (2001) 86 C.A.4th 472, 444

W**Water Runoff**

Deckert v. County of Riverside (1981) 115 C.A.3d 885, 408

Keys v. Romley (1966) 64 C.2d 396, 396

Z**Zoning**

Annicelli v. Town of South Kingston R.I. (1983) 463 A.2d 133, 441

Autopsy/Post Services, Inc. v. City of Los Angeles (2005) 129 C.A. 4th 521, 424

Avenida San Juan Partnership v. City of San Clemente (2011) 201 C.A.4th 1256, 422

California Building Industry Assn. v. City of San Jose (2015) 61 C.A. 4th 435, 421

Carty v. Ojai (1978) 77 C.A.3d 329, 442

Castner v. City of Oakland (1982) 129 C.A.3d 94, 442

City of Cleburne v. Cleburne Living Centers, Inc. (1985) 473 U.S. 432, 420

City of Santa Barbara v. Adamson (1980) 27 C.3d 123, 442

College Area Renters and Landlord Association v. City of San Diego (1994) 43 C.A.4th 677, 443

Consolidated Rock Products v. City of Los Angeles (1962) 57 C.2d 515, 441

Ewing v. City of Carmel-by-the-Sea (1991) 234 C.A.3d 1579, 443

Friends of Davis v. City of Davis (2000) 83 C.A.4th 1004, 444

Golden Gate Hotel v. San Francisco City and County (1993) 836 F. Supp. 707, 443

Hernandez v. City of Hanford (2007) 41 C. 4th 279, 421

Hope v. County of DuPage (1983) 717 F.2d 1061, 418

Lake Nacimiento Ranch v. San Luis Obispo County (1987) 830 F.2d 977, 419

Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 419

Lucas v. South Carolina Coastal Council (1992) 112 S. Ct. 2886, 419

National Land and Investment Co. v. Kohn (1965) 215 A.2d 597, 418

Pan Pacific Properties, Inc. v. Santa Cruz (1978) 81 C.A.3d 244, 441

Ross v. City of Yorba Linda (1991) 1 C.A.4th 954, 422

Southern Burlington County NAACP v. Township of Mount Laurel (1975) 336 A.2d 713, 418

United Advertising Corp. v. Borough of Metuchen (1964) 198 A.2d 447, 441

INDEX

A

abatement 396
abstract of judgment 369
abstract of title 458
acceleration on default 331
acceptance 147
accord and satisfaction 159
accretion 397
accusation 95
acknowledgment 248
action in personam 17
action in rem 17
actual notice 249
ademption 315
administrative agencies 7, 9, 11
Administrative Procedures Act 9, 10
administrator 316
ad valorem taxes 373
advance fee rental agents 113
adverse possession 309
advertising 107, 127, 357
aesthetic zoning 422
affirmation 379
affirmative easement 400
after-acquired title 251, 303
agency 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 40, 41, 42, 43, 45, 46, 58, 60, 62, 63, 78, 80, 109
 accounting 41
 authority of 36
 by estoppel 30
 by ratification 30
 coupled with an interest 46
 creation 29
 customary authority 36
 definition 27
 delegation of authority 37
 designated 35
 disclosure 32, 38, 40, 62, 109
 dual 31
 due care 40

 duties as a buyer 62
 duties to buyers 63
 duties to other brokers 78
 duties to principal 58
 duties to third persons 42
 express 29
 fees to nonlicensees 80
 fiduciary duty 37
 general agent 28
 gratuitous 35
 honesty 41
 implied 29
 implied authority 36
 integrity 41
 liability of agents 43
 liability of principals 45
 loyalty 41
 obedience 42
 ostensible agent 29
 power of attorney 28
 proof of 35
 secret profit 60
 special agent 28
 termination of 46
alienation clause 330
Alquist-Priolo Special Studies Zone Act 436
alternative dispute resolution 18
Americans with Disabilities Act 125
amortized note 328
antimerger clause 340
appraiser licensing 117
appurtenance 238
arbitration 18
Article 5 106
Article 7 107
as is, 72, 220
assignment (lease) 480
assumption of loan 354
attachment 372
attorney fees 218, 334

attorney-in-fact 28
attractive nuisance 285
avulsion 397

B

bait and switch 357
balloon payments 330
bankruptcy 354
beneficiary statement 452
bilateral contract 144
bilateral mistake 152
blanket encumbrances 354
blind ad 76
blockbusting 121
boundary disputes 391
breach of agency 45
broker-salesperson agreement 222
broker's license 99
builder liability 438
Bulk Sales Act 115
bulk zoning 422
bundle of rights 243
burden of proof 183
business opportunity brokers 114
buyer's duty 63

C

California 13
California Association of REALTORS® xiv
California Constitution 8
California courts 13
California Department of Real Estate 9
California Environmental Quality Act 435
California Fair Employment and Housing Act 130
California Housing Financial Discrimination Act of 356
California statutes 8
Cartwright Act 80
caveat emptor 63
CERCLA 287

certificate of sale 337
 cessation of work 379
 change of ownership 252
 chattels 239
 chattels real 239
 civil law 2
 Civil Rights Act of 1866 118
 Civil Rights Act of 1968 118, 121
 civil wrongs 18
 clearance receipt 114
 Coastal Zone Conservation Act 436
 codicil 315
 commercial frustration 158
 commission 183
 common elements 278
 common interest subdivision 277
 common law 2
 community apartment project 281
 community property 265, 266
 community property with right of survivorship 271
 compensatory damages 16, 161
 competent parties 145
 comprehensive zoning 422
 concurrent estates 247
 conditional public report 434
 conditional-use permit 423
 condition precedent 244
 condition subsequent 243
 condominium 278
 condominium conversions 501
 consideration 153
 constitutional law 3
 construction loans 350
 constructive eviction 497
 constructive notice 248
 consumer protection acts 354
 Consumer Recovery Account 104
 contingencies 219
 contingent remainder 245
 contracts 143, 144, 145, 147, 149, 150, 151, 152, 153, 154, 158, 159, 160, 161, 164, 165, 166, 181, 301, 302, 307
 adhesion 158
 anticipatory breach 159
 assignment of 165
 bilateral 144
 breach of 159
 commercial frustration 158
 competent parties 145
 consideration 153

definitiveness 150
 delivery 301
 discharge 158
 divisible 153
 exception 307
 executed 145
 executory 145
 express 143
 foreign language 166
 granting clause 302
 illusory 151
 implied 144
 impossibility of performance 158
 legal purposes 152
 mistakes 152
 mutual consent 147
 not required 302
 offer and acceptance 147
 quasi 144
 remedies 161
 rescission 164
 revocation 149
 tender 160
 unilateral 144
 valid 145
 void 154
 voidable 154
 controlled business arrangement 355
 cooperating broker agreements 198
 cooperatives 281
 corporation licenses 99
 corporations 275
 Costa-Hawkins Rental Housing Act 502
 counteroffer 148, 221
 Court of Appeal 12, 13, 14
 California Supreme Court 14
 district courts 12
 small claims courts 13
 special courts 13
 superior courts 14
 courts 11
 covenants, conditions, and restrictions 426, 427, 429
 creation of 427
 ending restrictions 429
 unenforceable restrictions 427
 criminal wrong 18
 cumulative zoning 420
 customary authority 36

D

declaration of homestead 381
 declaration of restrictions 426
 declaratory relief action 17, 164
 dedication 307
 deed in lieu of foreclosure 340
 deeds 300, 301, 302, 303, 306, 307
 acceptance 301
 acknowledgment 302
 competent parties 302
 consideration 302
 grant 303
 recording 302
 requirements of 300
 reservation 307
 types of 303
 void 306
 voidable 306
 defeasance clause 335
 defeasible estate 243
 deficiency judgments 337
 demise 473
 Department of Real Estate 9
 designated agency 35
 developer liability 438
 devise 315
 disability 125, 128
 disciplinary action 95, 101
 divisible contracts 153
 division fence 392
 doctrine of agreed boundaries 391
 domestic partnerships 266
 dominant tenement 399
 downzoning 422
 dragnet clause 350
 dual agency 31
 due-on-encumbrance clause 331
 due-on-sale clause 330
 duress 155

E

easement 398, 399, 400, 401, 403, 404, 405
 affirmative 400
 by estoppel 405
 by grant 400
 by implication 403
 by necessity 404
 by prescription 401
 by reservation 401
 dominant tenement 399
 in gross 399

- maintenance of 399
 - negative 400
 - termination of 405
- ejectment 474
- elder abuse law 455
- Ellis Act 501
- emancipated minor 146
- emblems 239
- eminent domain 310
- employee 56
- encroachment 393
- endangered species 438
- environmental impact report 435
- environmental impact statement 435
- environmental law 435
- Equal Credit Opportunity Act 355
- equal dignities rule 36
- equitable remedies 16, 163
- escheat 316
- escrow agent 111
- escrow duties 452
- escrow instructions 450
- escrows 111, 449, 451, 452, 453, 454, 455, 456, 457, 458
 - charges and prorating 457
 - deposits 456
 - designating escrow 452
 - disclosures 454
 - doctrine of relation back 457
 - escrow agents 111, 452
 - escrow amendments 451
 - exemptions 452
 - licensing 452
 - mobile home 458
 - prohibitions 453
 - risk of loss 455
 - termination 456
- estimated buyer's costs 221
- estoppel 30, 167
- ethics 56
- eviction 493
- exception in a deed 307
- exclusionary zoning 420
- exculpatory clause 477
- executed contract 145
- execution sale 371
- executor 316
- executory contract 145
- exemplary damages 16, 161
- express agency 29
- express authority 36
- express contract 143

F

- facilitator 35
- Fair Credit Reporting Act 356
- fair housing 117, 476
- fair housing poster 122
- familial status 118, 128
- federal administrative agencies 7
- federal courts 11
- federal statutes 8
- fee simple 243
- fictitious name 272
- fictitious trust deed 345
- fiduciary duty 37
- Fifth Amendment 6
- financing statement 353
- finders' fee 198
- FIRREA 313
- First Amendment 4
- fixtures 240, 476
- foreclosure 17, 335
- foreign corporation 276
- forged deed 306
- Fourteenth Amendment 7
- Fourth Amendment 6
- franchisees 58
- franchise sales 116
- fraud 59, 76, 154
- freehold estates 247
- fructus industriales 239
- fructus naturales 239

G

- Garn Act 346
- general lien 373
- general partner 271, 272
- general plan 418
- gift deed 306
- good faith 183
- government seizure 313
- grandfather clause 424
- grant deed 303
- group boycotting 80

H

- habitability 483
- hazardous substance disclosure 287
 - lead paint 287
- history 237
 - California land 237
- Holden Act 356
- holder in due course 329

- hold-harmless clauses 182
- holographic will 315
- homeowners association 278, 372
- Homeowner's Guide to Earthquake Safety 72
- homestead declaration 381, 382
- hypothecate 334

I

- illusory contract 151
- implied agency 29
- implied authority 36
- implied contract 143
- impossibility of performance 158
- impound accounts 334
- incentive zoning 422
- inclusionary zoning 421
- Independent Administration of Estates Act 319
- independent contractor 56
- injunction 17, 164
- installment note 328
- interim occupancy agreement 221
- internet resources xi
- interpleader action 457
- interpretation 157
- interpretation of contracts 157
- Interstate Land Sales Full Disclosure Act 434
- intestate succession 316
- inverse condemnation 312
- involuntary liens 369
- involuntary transfers 308

J

- joint tenancy 262, 263
 - creation of 263
 - termination 263
 - unities 263
- joint ventures 273
- judgment liens 369
- judgments 170
- judicial remedies 15, 161
- junior lienholders 344
- jurisdiction 15

L

- lashes 169
- landlord rights and responsibilities 482, 483, 491
 - entry 483
 - security 491

late charges 108, 332
 latent defects 72
 lateral support 397
 law, definition 1, 56
 lawsuit procedure 14
 lease options 351, 477
 leases 222, 475, 476, 477, 478, 480, 481
 assignment and subleases 480
 exculpatory clause 477
 fixtures 476
 forms and provisions 475
 notices and management 476
 options 477
 security deposits 478
 termination of 481
 legal citations ix
 legal purpose 152
 liability of agents 43
 liability of principals 44
 liable for injuries 485
 license 406
 license renewals 100
 licensing 94
 liens (placed by nonowners) 345
 life estates 244
 limited common elements 278
 limited liability companies 276
 limited partnerships 273
 liquidated damages 16, 162
 lis pendens 381
 listings 61, 181, 182, 183, 184, 190, 191,
 192, 193, 194
 advance costs 194
 advance fee addendum 194
 burden of proof 183
 buyer listings 192
 commission 183
 copies 184
 exclusive agency listing 190
 exclusive authorization and right-to-
 sell 190
 exclusive listings 184
 hold-harmless clause 182
 keybox 190
 loan broker listings 194
 modification 194
 net listings 193
 no deal–no commission 183
 open listing 191
 option listings 61
 oral listings 192
 procuring cause 191

safety clause 190
 signed 184
 subagents 182
 termination date 184
 littoral rights 397
 livery of seisin 299
 living trust 319
 lock-in clause 332

M

marital agreements 267
 marketable title 310
 market allocation 80
 maxims of jurisprudence 19
 mechanics' liens 374, 377, 378, 379, 380
 cessation of work 379
 enforcing 380
 notice of completion 378
 notice of nonresponsibility 377
 preliminary notice 378
 priority of 380
 recording 379
 stop notice 380
 termination of 380
 mediation 18
 Megan's Law 73
 menace 155, 497
 merger 405, 481
 mineral, oil, and gas brokers 110
 mineral, oil, and gas rights 239
 minor 145
 misrepresentation 77, 155
 mistaken improver 242
 mitigation of damages 161
 mobile home disclosures 72
 mobile home evictions 499
 mobile home park rules 500
 mobile homes 242
 mobile home sales 111
 mobile home tenancies 498
 monetary damages 161
 mortgage brokers 105
 Mortgage Forgiveness Debt Relief Act of
 2007 340
 mortgage loan disclosure statement 109,
 222
 mortgages 334, 335, 336, 337
 deficiency judgments 337
 foreclosure 335
 right of redemption 336
 mutual consent 147

N

National Environmental Policy
 Act 435
 Natural Hazards Disclosure Statement
 72
 negative declaration 435
 negative easement 400
 negotiable instruments 328
 net listing 61, 193
 nominal damages 16, 162
 nonconforming use 424
 noncumulative zoning 420
 nondisturbance clause 482
 nonfreehold estates 247, 253
 nonjudicial remedies 18
 notice of cessation 379
 notice of completion 378
 notice of default 341, 345
 notice of delinquency 345
 notice of nonresponsibility 377
 notice of sale (trust deed) 342
 novation 160
 nuisance 395
 nuncupative will 315

O

obligatory advances 350
 Omnibus Housing Nondiscrimination
 Act 131
 open listing 191
 opinion of title 458
 option listing 61
 options 156, 195
 ordinances 11
 or more clause 332
 ostensible agency 29
 owner liability 283
 ownership 243, 260
 ownership in severalty 260

P

parol evidence rule 166
 partial zoning 422
 partition action 264
 partnership license 99
 partnerships taxation 273
 party walls 392
 patent defects 72
 patents 238
 periodic tenancy 474
 personal property 239

place of public accommodation 125
 planned development 282
 police power 310
 power of attorney 28
 predatory lending 358
 preliminary notice 378
 preliminary public report 434
 preliminary title report 460
 premarital agreements 267
 prepayment penalties 108, 332
 price-fixing 80
 principal 27
 priority of recording 250
 privity of contract 182
 probate 316
 procuring cause 191
 promissory note 328
 property 238
 property taxes 373
 Proposition 13 252, 373
 public report 433
 puffing 77
 punitive damages 161
 pur autre vie 244

Q

quasi contract 144
 quiet enjoyment 491
 quiet title 17
 quitclaim deed 305

R

ratification 30
 real estate investment trusts 275
 real estate purchase contract 199, 219
 contingencies 219
 Real Estate Settlement Procedures Act
 (RESPA) 334, 355
 real property 238
 real property sales contract 346
 real property transfer disclosure state-
 ment 65
 Realtist 79
 REALTOR® 79
 rebate law 463
 recording 247, 379
 recreational user immunity 285
 redemption rights (execution sale) 371
 redlining 121, 356
 referral fees 78
 reformation 17, 164

release clause 354
 release of contract 228
 reliction 397
 remainder interest 245
 rent control 501
 rent skimming 59
 repossession of mobile homes 345
 request for notice of default 345
 rescission 17, 164
 reservation in a deed 307
 residential lease 222
 respondeat superior 44
 restraints against alienation 244
 restricted licenses 104
 retaliatory eviction 497
 retention of records 222
 reversionary interest 243, 245
 revocation of offer 149
 rezoning 423
 right of correlative user 397
 right of first refusal 156
 right of prior appropriation 397
 riparian rights 397
 rule against perpetuities 247
 Rumford Act 130
 runoff damage 396

S

SAFE Act 111
 safety clause 190
 sales in foreclosure 347
 salesperson's license 98
 salesperson status 56
 S corporation 276
 seals 169, 303
 secret profit 60
 security agreements (personal property)
 353
 security deposits 478
 security (premises) 491
 seller financing 350
 seller financing disclosure statement 221,
 351
 seller's net 194
 send-out slip 102
 servient tenement 399
 severance damage 313
 sheriff's deed 305
 Sherman Antitrust Act 80
 silence to offer 148
 simultaneous death 315

Solar Shade Act 404
 special assessments 373
 specific liens 373
 specific performance 16, 163
 spite fence 392
 spot zoning 422
 standard subdivision 277
 stare decisis 2
 statute of frauds 165
 statute of limitations 104, 168, 354
 statutory law 3
 steering 121
 stock cooperatives 281
 stop notice 380
 straight note 328
 subagents 79
 Subdivided Lands Law 277, 432, 433,
 434
 conditional public report 434
 preliminary public report 434
 public report 433
 Subdivision Map Act 429, 430, 431
 exceptions 430
 final map 431
 tentative map 430
 subdivisions 277
 subjacent support 398
 subject to a loan 353
 subleases 480
 subordination clause 59, 353
 substantial performance 160
 successive estates 247
 successor liability 115
 surrender 498
 survivorship 260
 syndicates 110, 274

T

tax deed 305
 taxes (real property) 373
 tax liens 373
 tenancies 260, 265, 271, 473, 474
 joint tenancy 262
 periodic tenancy 474
 tenancy at sufferance 474
 tenancy at will 474
 tenancy by the entirety 265
 tenancy for years 473
 tenancy in common 260
 tenancy in partnership 271

tenant rights and responsibilities 491,
492, 496
duties 492
foreclosure 496
quiet enjoyment 491
repairs 491
tender 160
Tenth Amendment 7
termination of agency 46
termination of partnerships 273
testate succession 315
testator 315
third-party beneficiary 159
Thirteenth Amendment 7
thirty-day notice 474
three-day notice 493
three-month notification of default 341
tie-in agreements 80
time is of the essence 148
time-shares 282
title insurance 458, 460, 461, 463
exclusions 461
extended coverage policy 461
lender policies 461
policy interpretation 463
preliminary title report 460
rebate law 463
special policies 463
standard policy 460
title insurance companies 463
trade fixtures 241, 477
transaction broker 35
transfer disclosure statement 65
treaties 7

Treaty of Guadalupe Hidalgo 3
trees (boundary) 393
trespass 394
trust deeds 305, 340
trustee's deed 305
trustee's sale 342
trusts 274
truth in lending 356
Truth in Savings Act 356

U

unconscionable contracts 158
undivided interest subdivision 277
uniform codes 9
Uniform Electronic Transactions Act
147
Uniform Partnership Act 271
Uniform Simultaneous Death Act 262
unilateral contract 144
unilateral mistake 152
unincorporated associations 277
unlawful detainer 494
unlawful detainer assistants 496
Unruh Civil Rights Act 128
unsophisticated buyers 75
upzoning 423
usury 109, 333

V

valid contract 145
variance 423
venue 15
vested remainder 245
vicarious liability 44

voidable contract 154
voidable deed 306
void contract 154
void deed 306

W

waiver 163, 165
warranty deed 305
waste 245
water rights 396
wild document 251
will 315
wraparound trust deed 350
writ of execution 370
writ of possession 494

Z

zoning 417, 420, 421, 422, 423, 424
aesthetic 422
bulk 422
comprehensive 422
conditional-use permit 423
cumulative 420
downzoning 422
exclusionary 420
incentive 422
inclusionary 421
nonconforming use 424
noncumulative 420
partial 422
rezoning 423
spot 422
upzoning 423
variance 423